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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
AND IN
THE COURT FOR THE TRIAL OF IMPEACHMENTS
AND THE
CORRECTION OF ERRORS
OF THE
STATE OF NEW-YORK.

BY JOHN L. WENDELL,
Counsellor at Law.

VOLUME III.

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JUDGES
OF THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF NEW-YORK,

DURING THE TIME OF THE THIRD VOLUME OF THESE REPORTS.

JOHN SAVAGE, *Chief Justice.*
JACOB SUTHERLAND, } *Justices.*
WILLIAM L. MARCY, }

CIRCUIT JUDGES.

FIRST CIRCUIT.
OGDEN EDWARDS.

SECOND CIRCUIT.
JAMES EMOTT.

THIRD CIRCUIT.
WILLIAM A. DUER.*

FOURTH CIRCUIT.
ESEK COWEN.

FIFTH CIRCUIT.
NATHAN WILLIAMS.

SIXTH CIRCUIT.
SAMUEL NELSON.

SEVENTH CIRCUIT.
DANIEL MOSELY.

EIGHTH CIRCUIT.
ADDISON GARDNER. †

GREEN C. BRONSON, *Attorney General.*

*JAMES VANDERPOEL, counsellor at law, was appointed judge of the third circuit on the 12th of January, 1830, in the place of the Hon. WILLIAM A. DUER, who resigned his office on receiving the appointment of President of Columbia College in the city of New-York.

†ADDISON GARDNER, counsellor at law, was appointed judge of the eighth circuit on the 25th of September, 1829, in the place of the Hon. JOHN BIRDSALL, resigned.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF NEW-YORK.

IN AUGUST TERM, 1829, IN THE FIFTY-THIRD YEAR OF OUR INDEPENDENCE.

HAXTON and BRACE vs. BISHOP.

THIS was an action of assumpsit, tried at the Greene circuit, in April, 1829, before the Hon. WILLIAM A. DUER, one of the circuit judges.

In an action by the receivers of a bank, appointed under the act to prevent fraudulent

bankruptcies, &c. to recover the amount of a note discounted at the bank, falling due after the appointment of the receivers, bank notes of the same bank of which the defendant became the holder, previous to his note falling due, cannot be set off against the demand of the plaintiffs, although, on the day his note falls due, the defendant makes a tender of the same in payment of his note.

Receivers are trustees not for the bank, but for the creditors of the bank. Their appointment, and the possession of a note by them, is a transfer or assignment of the note for the benefit of all the creditors; consequently, bank notes holden by a debtor of the bank, whose note has not fallen due, cannot be set off against a note thus transferred before maturity. Even had the note of the debtor been due when transferred, and payment had not been made or tendered before the transfer, a set off would not have been allowed.

An assignment of its property by a bank, after it has stopped payment, to persons other than officers or stockholders, in trust to apply the proceeds to the payment of all the creditors of the bank, in equal proportions, is a valid instrument, and not void under the provisions of the act to prevent fraudulent bankruptcies; and bank notes of the same bank, purchased by a debtor after such assignment, cannot be set off in an action against him.

An action on a promissory note endorsed in blank, belonging to a bank, may be sued by receivers or assignees, in their proper names, *endorsees*, without specifying their character as receivers or assignees.

In an action on a bank note payable on demand generally, and not at a particular place, a demand of payment is not necessary before the commencement of a suit.

Nor is a demand necessary on a note payable on demand at a particular place; but if, in such case, the defendant shows that he was ready at the place to make payment, and brings the money into court, he discharges himself from interest and costs.

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The declaration contained a count against the defendant as the maker of a promissory note for \$1000, dated 25th May, 1826, payable in 90 days to Ira T. Day, at the Greene County Bank, and endorsed by him and Horace Austin. There were also the common money counts. The defendant pleaded the general issue and gave notice that on the trial of the cause he would prove that the note in question was discounted by the Greene County Bank for the accommodation of the maker, whereby the bank became the owner and holder of the same, and continued such holder until the 14th of August, 1826, when the plaintiffs were appointed *receivers* in pursuance of the act to prevent fraudulent bankruptcies by incorporated companies; that on the 20th of August, in pursuance of their appointment, the note in question was received by them from the officers of the bank; that on the 1st August, 1826, the Greene County Bank was indebted to the defendant in the sum of \$2000 for money had and received, and lent and advanced, &c.

The note and endorsements being admitted, the defendant proved that on the 17th day of July, 1826, the Greene County Bank stopped payment; that the note in question had been discounted by the bank, was its property, and remained so, when the bank stopped payment. The defendant's counsel then objected to a recovery by the plaintiffs, contending that, by the sixth section of the act to prevent fraudulent bankruptcies, &c. (Statutes, vol. 7, p. 448 a,) a transfer of the note was void. The plaintiffs contended that the note being endorsed *in blank*, the defendant could not question the plaintiffs' right to recover. The judge decided the transfer to be void; whereupon the plaintiffs produced an assignment bearing date 28th July, 1826, from the Greene County Bank, under its corporate seal, to the plaintiffs and another person, of all the property, debts, securities, choses in action, &c. of the bank, *in trust* to apply the proceeds of the same to all the creditors of the bank, in equal proportions, according to the amount of their respective debts; and in case of surplus, to re-assign the same to the officers of the bank, for the use and benefit of the stockholders, deducting the expenses of the trust. The defendant's counsel insisted

that this assignment also was void ; which objection was also sustained by the judge. The plaintiffs then produced an exemplification of the proceedings in chancery, shewing a petition of the attorney general, stating the insolvency of the bank, and praying an injunction restraining the bank from the exercise of its franchises, from collecting or receiving any debts, or paying or transferring any of its monies or effects, and for the appointment of a receiver, in conformity to the directions of the statute ; an injunction issued in pursuance thereof, and served on the officers of the bank, the 15th August, 1826 ; an appointment of the plaintiffs as receivers on the 14th August, 1826, and an order to institute suits, made on the 25th October, 1826 ; and proved that after the *assignment* of the 28th July, the notes, &c. of the bank were delivered to the assignees ; that after the *appointment* of the receivers, the business relative to the bank was continued to be done at the banking house, under the control of the receivers, and that this suit, together with others, was instituted by their direction. The defendant again moved for a nonsuit, on the ground that the suit should have been instituted in the corporate name of the bank, or in the names of the plaintiffs, in their character as receivers. The Judge decided that the action was properly brought in the names of the plaintiffs generally, who must be considered as suing for the benefit of the creditors of the bank ; and that whatever legal or equitable claim of set off the defendant might have against the bank would be allowed ; and denied the motion for a nonsuit.

The defendant then proved that on the 23d day of August, 1826, he presented at the Greene County Bank \$1000 of its notes, all bearing date previous to the 17th July, 1826, and demanded payment of the same, which was refused ; that he then tendered the same bank notes in payment of the note on which this suit is brought, and that they were refused to be thus received ; that on the *thirtieth* day of July, 1826, he had in his possession \$829 of Greene County Bank notes, received by him of a Mr. Sandford at *par*. Sandford had received the notes of a Mr. Rodgers, in New-York, to pass off, with a knowledge that the bank had stopped payment, and

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the defendant, with a like knowledge, took them of Sandford. On the part of the plaintiffs; it was shewn that on the *twenty-sixth* day of July, 1826, the defendant settled an agency account with the bank, and paid \$100 due on such settlement in Greene County Bank bills, saying that he had no more of such bills at *par*.

On this evidence, the defendant claimed that the \$1000 should be allowed as a set off. The plaintiffs' counsel objected that to entitle the defendant to the set off, he should have shewn himself in a situation to have brought a suit against the bank, by a demand of payment of the notes previous to the appointment of the plaintiffs as receivers. The judge ruled that demand of payment of a bank note, made payable on demand, was not necessary before suit brought, and directed the jury to find a verdict for the defendant, who found accordingly. A motion was now made to set aside the verdict.

Dorlon, for plaintiffs.

R. Sedgwick, for defendant.

By the Court, SAVAGE, Ch. J. Several questions were raised in the progress of the trial, which will be noticed in their order.

1. It was objected that the plaintiffs could not declare as endorsees, but should have declared specially as receivers. The judge decided that the action was well brought by the plaintiffs as endorsees. To this decision, I can see no objection. In point of form, the plaintiffs shew a good title to the note, and in point of fact, they had title as receivers, if not as assignees; and, as the defendant was not thereby deprived of any defence which he would have had if they had declared as receivers, there is no good reason for supporting this objection.

2. The judge decided that the transfer of the note and the assignment of the 28th July, were void by virtue of the sixth section of the act to prevent fraudulent bankruptcies by incorporated companies, (Statutes, vol. 7, p. 450 a.) That section prohibits an assignment of any property to any officer

or *stockholder* for the payment of any debt, and any assignment to *any person* in contemplation of insolvency ; and renders such assignments void. The assignment in this case was not made to any officer or stockholder for the payment of any debt of theirs ; nor was it an assignment to any one in contemplation of insolvency, within the purview of the act. If it is void, it must be because it is against the policy of the act. Instead of being so, it seems to me to have been in accordance with it. The statute intended to prevent an assignment which should give a preference to the officers or stockholders, and that a fair dividend should be made among the *bona fide* creditors ; but I can see nothing in this section of the act, or any other, which, before an injunction, prohibits receiving monies due to the bank, or paying any of its creditors, except officers and stockholders of the bank, by transferring the property of the bank in payment. The assignment of July 28th was therefore, in my opinion, a valid instrument. If every assignment was forbidden, by the sixth section, there was no necessity for providing, in the seventeenth section, for an injunction to prevent the transfer of the effects of the bank. Besides, if every assignment was intended to be prohibited, it is strange that the legislature should have selected two instances only : one before insolvency, and in anticipation or *contemplation* of that event ; the other, after insolvency, to *officers* or *stockholders* for the payment of any debt. The assignees here do not appear to be either officers or stockholders ; and the object is not to pay any debt due to such officers or stockholders, but for the benefit of all the creditors of the bank.

But perhaps it is not important in this case whether the assignment of the 28th July was valid or not, as the plaintiffs were appointed receivers on the 14th August, before the note declared on was due. This appointment of receivers constituted the plaintiffs trustees, not for *the bank*, but for *the creditors* of the bank. The note was a negotiable note, transferred before due, and the set off can no more be allowed than if the parties here had been individuals. Where the payee transfers a note before due, while the maker holds a note against him, or has any other demand against him, nothing

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is better settled than that the holder of the note by endorsement has nothing to do with the state of the accounts between the original parties. Even had the note declared on been due, but no payment made or tendered before the transfer, according to the decision of this court in *Wheeler v. Raymond*, (5 Cowen, 231,) confirmed in the court of errors, there could have been no set off. A set off must be between the parties to the record. The ground upon which it was admitted in this case was, that the plaintiffs were trustees for the bank. That was certainly an error. Receivers are appointed for the security of the creditors, and the property becomes the property of the creditors. They must take it, indeed, subject to all legal incumbrances; but before the note was due, the defendant could not have any legal claim to set off, as against any one to whom the bank might transfer it. Suppose the bank had transferred this note before they stopped payment, and while the defendant held the bills of the bank to an equal or greater amount, it would not be pretended that the fact of having the bills constituted a demand which could be set off; and yet there is no real difference between this case and the case supposed, when we consider the appointment of the receivers and the possession of the note by them, a transfer or assignment of the note for the benefit of all the creditors. All the creditors collectively should be in no worse situation than an individual creditor would have been. The fact of stopping payment does not vary the rights of the parties to a note or bill, provided the transfer in both cases be made before the note is due and payable.

The cases cited of *The Bank of Niagara v. McCracken*, (18 Johns. R. 493,) and *Jefferson Co. Bank v. Chapman*, (19 Johns. R. 322,) are not applicable here. In the first, the demand was assigned after the note was due; in the second, there was no assignment in the case. The set off was excluded because the right did not exist at the commencement of the suit. Nor do the cases under the English bankrupt act apply. They are decided upon those acts, and do not seem to me to be analogous.

The justice of this case clearly corresponds with my conceptions of the law. When the bank stopped payment, the defendant was, as is admitted, a debtor to the amount of his note. This ought to be paid for the benefit of all the creditors, and not of Mr. Rodgers or Mr. Sandford, or any other bill holders in particular. But if a debtor can connive with his particular friends, who happen to hold the bills of the bank, and a considerable portion of the debtors might do the same thing, it will be perceived that the object of the legislature might be frustrated; and instead of all the creditors receiving a proportion of their demands, some will be paid in full, while others perhaps will receive nothing. There is no sympathy to be felt for the defendant. He had the money in his pocket to pay his note; and instead of doing so, he chooses to purchase at par the bills of an insolvent bank. If he loses, therefore, it is his own fault.

The grounds upon which I have placed the decision are applicable to all the other cases relating to the Greene County Bank, decided at the last October term, and render it unnecessary to decide a point raised here, and also in one of those cases; I mean the case against *Edward T. Stevens*.* In that case, the defendant was possessed of \$80 of the bills of the bank before the assignment; and the judge at the circuit decided against the set off, on the ground that the defendant had no cause of action, the notes of the bank being payable on demand, and *no demand being shewn* until after the assignment by the appointment of the receivers.

Whether a bank notes, payable on demand without specifying any place of payment, may be prosecuted without a demand at the banking house from which it issued, seems not to have received a judicial decision in this court. In the case of *The Bank of Utica v. Magher*, (18 Johns. R. 441,) it was held that no action lay upon the bills issued by the branch at Canandaigua, unless first demanded there. The act authorizing the establishment of an office of discount and deposit at Canandaigua, directed that no notes should be issued at such office unless countersigned by the cashier; and when so countersigned, they should be considered as paya-

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ble on demand *at the office of the said branch*. Spencer, Ch. Justice, in giving the opinion of the court, says, "Considering the object and provisions of the act, we have no hesitation in saying that payment of such bills must first be demanded at the branch." This was in accordance with the object of the legislature, which was, that a part of the funds of the bank of Utica should be transferred to Canandaigua, for the purpose of banking operation there. It was highly proper, therefore, that there should be a demand upon the branch which had possession of those funds, before the parent bank should be subjected to a suit. *In the bank of Niagara v. McCracken*, (18 Johns. R. 493,) Woodworth, justice, expresses an opinion that bank bills, payable on demand and not at any particular place, would sustain an action without a demand at the bank. In the case of *The Jefferson County Bank v. Chapman*, (19 Johns. R. 322,) this opinion of Mr. Justice Woodworth was said not to be the opinion of the court, and that the question whether a demand was necessary in such a case, was open; but it did not become necessary to decide it in that case. In the former of these cases a set off was allowed, on the ground that the defendant held \$419 of the bills of the Niagara bank after his note became due to the bank, and before any suit was commenced, though they were not demanded at the bank until after the defendant's note had been assigned. The court, however, did not think the assignment varied the rights of the defendant, because the assignment was after the defendant's note had become due, and the assignee took it subject to all the equity existing at the time between the original parties. Perhaps, since the case of *Wheeler v. Raymond*, even that set off would not now be allowed, although a payment upon the note, or an appropriation of a counter demand after due and before assignment, undoubtedly would. These cases, therefore, do not decide the question. In the case of *Caldwell v. Cassidy*, (8 Cowen, 272, 3,) I remarked, that in case of a note payable on demand at a certain place, (a bank note for instance,) I thought a demand would be necessary, and referred to 5 T. R. 30, and 16 East, 112; and such I still think is the law in England at the present day, as ap-

pears from the cases cited in regard to all promissory notes, when the place of payment forms a part of the note itself. In this court, however, we hold that on such a note a demand at the place of payment is not necessary; but if the maker was at the place of payment with funds to pay the note, that fact is a good defence against interest and costs, provided the defendant avails himself of the defence by pleading it and bringing the money into court. Bank notes are promissory notes, and actions founded upon them are governed by the same rules. The corporation being a person in law, has the same rights, and is subject to the same liabilities as an individual, unless the act of incorporation varies those rights and liabilities. In relation to promissory notes, it is well settled that in an action on a note payable on demand, generally no demand need be proved; the commencement of the suit is a demand. So also is an action on a note payable at a particular place, on a particular day, it is not necessary to aver or prove a demand at the time and place; but the readiness of the defendant is matter of defence. It seems to follow, that in an action on a note payable on demand at a particular place, no demand need be averred or shewn; but if the defendant pleads that when the demand was made, that is, when the suit was commenced, he was ready at the place mentioned in the note to make payment, and brings the money into court, he discharges himself from interest and costs. Mr. Chitty, in his Treatise on Bills, p. 426, remarks, that a mode of enforcing bank notes was provided by 8 and 9 Wm. 3. ch. 20, sect. 30. This was within a few years after the incorporation of the bank of England. "But now, when the right to receive payment is disputed, the course is to proceed by action against the bank." Both in England and here bank notes for some purposes are considered money; but in both countries, the remedy upon them is the same as upon promissory notes by individuals. If this be a correct view of the question, a holder of a bank note previous to suit need not make a demand of a note payable *on demand at the bank*; but if the bank is solvent, a defence will be made out, which will subject the plaintiff to costs. So, too, upon a bank note payable generally on demand, the commencement

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of a suit is a demand ; and it seems to me no other demand is necessary to sustain an action upon it.

If I am right, then, the defendant, Bishop, might have prosecuted the bank upon the notes which he held, previous to the appointment of the receivers in this case ; and had the note upon which this suit is brought been then due, according to the case of *The Niagara Bank v. McCracken*, the notes which he held on the 31st July would be a good set off ; and if the defendant was correct in his position that the plaintiffs are trustees for the bank, the set off should be allowed. But in the case of *The Niagara Bank v. McCracken*, either the doctrine of set off was not understood as it now is, or the court did not consider the interest of the assignees, the suit not being in their names. Upon the whole case, I consider these propositions as established : 1. That the plaintiffs, either as assignees or as receivers of the court of chancery, are trustees for the creditors of the bank, but not for the bank itself, or its stockholders ; 2. That the plaintiffs having a lawful title to the note on which this suit is brought, may set out any correct legal title, either as endorsees or as receivers ; 3. That the set off cannot be admitted—because, 1. The note on which this suit is brought, was assigned by the bank for the benefit of their creditors, before the defendant bought the notes which he seeks to set off ; and 2. Even if that assignment was void, the note passed before it was due into the hands of the plaintiffs as receivers of the court of chancery, and trustees for all the creditors ; and the note being negotiable, and having been negotiated before it was due, the maker cannot set up a defence of set off ; 3. The maker of a promissory note can never, under any circumstances, set off against the endorsee a demand against the payee, provided the note was endorsed bona fide, and for a valuable consideration, before maturity. Although, therefore I consider the notes which the defendant purchased of Sanford, a legal demand against the bank, and one which he had a right to prosecute without any demand, still that demand cannot avail him in this suit, the note having been transferred before it was due. Had the note become due before the transfer, and had the defendant made any payment

upon it after due, or tendered such payment, that would have been a defence which would have been available to the defendant against the note, in the hands of any holder to whom it might have passed subsequently. But the mere having a demand against the payee of a note is of no consequence in a defence to the note, provided it was endorsed before maturity.

In my opinion, the plaintiffs made out a case entitling them to recover; and as the verdict was for the defendant, a new trial must be awarded, with costs to abide the event.

New trial granted.*

* At the last October term of this court, there were *four* cases decided in actions brought by the same plaintiffs as receivers of the Greene County Bank, in which substantially the same questions arose as in this cause. One of them was the case of *Haxtun & Brace v. Stevens*, referred to in the opinion of the chief justice. This cause was tried before the Hon. Ogden Edwards, in April, 1826. The suit was on a promissory note for \$125, due the 24th August, 1826. The defendant offered to prove, that previous to the assignment of the 28th July, and previous to the appointment of the plaintiffs as receivers on the 14th August, 1826, he was possessed of bank notes of the Greene County Bank, payable generally on demand, to the amount of \$80; and that on the 24th August, he tendered to a clerk of the bank and of the plaintiffs, \$125 of the bills of that bank, in payment of his note, which was refused to be accepted. The judge rejected the evidence, deciding that the \$80 could not be set off, because a demand of payment had not been made prior to the appointment of the plaintiffs as receivers; and as the residue of the sum of \$125, that it could not be set off, because when the defendant became possessed of the same, his note had been virtually assigned for the benefit of the creditors of the bank. A verdict was rendered for the plaintiffs, and on application to this court, a new trial was refused. It will be perceived, that although the court in the principal case do not sanction the doctrine that a demand is necessary previous to a suit brought on a bank note payable on demand generally, still that the set off as to both sums was inadmissible, with in the principles established by that case.

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NIBLO vs. CLARK.

The plea of *nil debit* to an action of debt on recognizance of bail is bad on general demurrer.

A licence or permission by a plaintiff to a defendant to depart this state, and an agreement that all proceedings on the judgment against him shall be stayed until his return, may be plead in bar to an action against the bail, on the recognizance.

ERROR from the New-York common pleas. Clark sued Niblo in an action of debt on recognizance, entered into by Niblo as the bail of one Edward King, in a suit prosecuted by Clark against King, in the New-York common pleas. Niblo pleaded, 1. *Nil debit*; 2. The death of the principal after judgment and before the return of a *ca. sa.*; 3. That after the judgment against the principal, and before the issuing out of *ca. sa.* thereupon, to wit, on the 1st December, 1827, at the city of New-York, the plaintiff gave licence and granted permission to the principal to depart from the city of New-York and proceed to Mobile, in the state of Alabama; and agreed with the principal that all proceedings upon the judgment against him should be stayed until his return from Mobile; that thereupon the principal departed and proceeded to Mobile; and hath not since returned; whereupon he prayed judgment, &c. To the first and third pleas the plaintiff demurred, and to the second he replied, setting forth the suing out of a *ca. sa.* against King on the 17th December, 1827, returnable on the third Monday of January then next, a return by the sheriff of *non est inventus*, and an averment that at the issuing and return of the writ, the defendant therein named was living at the city of New-York. The defendant joined in demurrer, and to the replication rejoined, that at the return of the *ca. sa.* the defendant in the original judgment was not living as alleged by the plaintiff. The common pleas gave judgment for the plaintiff on the demurrers to the first and third pleas. The issue on the second plea was subsequently tried, and a verdict found for the plaintiff; upon which judgment was entered for the plaintiff for his debt, damages and costs; to reverse which judgment the writ of error was sued out.

J. L. Wendell, for plaintiff in error.

D. B. Tallmadge, for defendant.

By the Court, SUTHERLAND, J. The first plea is bad on general demurrer. It is *nil debit to debt on recognizance of bail*. The case of *Bullis v. Gibbons & Brown*, (8 Johns. R. 82, is precisely in point. The authorities there cited fully shew that *nil debit* is not a good plea to such an action. The specialty or record is not merely inducement to the action, but the action is founded upon it. In the latter case *nil debit* cannot be pleaded, though it may in the first. (1 Saund. 39, n. 3. 2 Ld. Raym. 15. 2 Strange, 778. 8 Mod. 107, n. 5 Burr. 2586.) The judgment below was therefore correct so far as it relates to the demurrer to the first plea.

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But I am inclined to think the third plea is good. It states that the plaintiff gave a licence or permission to King, the principal, to go to Mobile, and agreed with King that all proceedings on the judgment against him should be stayed until his return; and avers that King thereupon departed for Mobile, before any *ca. sa.* was issued against him on the judgment, and that he has not since returned therefrom. The objection taken to the plea is, that it states no consideration for the agreement on the part of the plaintiff; that it was a *nudum pactum*; and that the plaintiff was *not legally* restrained by it from proceeding immediately against King. It appears to me that it is not material whether the agreement was or was not binding between the parties to it. The plea shews, that in consequence of it King actually went to Mobile, and has not yet returned. It proceeds upon the ground that it is an act of fraud in the plaintiff, after having induced the principal to depart by agreeing to suspend all proceedings against him, (and of course against his bail,) to avail himself of such absence, induced by his own act, to charge the bail. The case of *Rathbone v. Warren*, (10 Johns. R. 587,) is distinguishable from this only in the circumstances, that there the principal paid a part of the debt in consideration of the licence to depart, and the agreement of the plaintiff not to proceed and charge the bail. The agreement in that case was made on the 11th of November, and was to continue in force only until the 20th February following. Waiving the question whether the payment of a part of the debt was a good legal consideration for the promise of the

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plaintiff to suspend execution, it is sufficient to remark that the case is not put upon that ground, either by the counsel who argued it, or by the judge who delivered the opinion. Judge Spencer remarks, that bail are to be considered, to all intents and purposes, as sureties; and he continues, "The appellants, who are to be treated precisely as if they were the obligees of a bond, have thought proper, on receiving a part of their debt from the principal, to enter into a stipulation not to proceed against him until after a certain day. This stipulation undoubtedly induced the principal to leave the state, and the situation of the bail was thereby materially changed, and his risk greatly increased. It appears to me, that on principles of good faith and common honesty, this act must be deemed to have exonerated the bail. In that case, the plaintiff did not proceed until the time limited by his agreement had expired; but here the suspension was indefinite until the return of the principal. To proceed to charge the bail in this case is most emphatically then a violation of the principles of good faith and common honesty, as it is a breach of the very terms of the agreement. But the true ground appears to me to be this: that the plaintiff has, by his act, greatly increased the risk and hazard of the surety, by entering into an arrangement with the *principal* which induced him to leave the state; and the case does not depend, in any degree, upon the question whether the contract was one for the violation of which the principal could or could not maintain an action. Whether he could or could not maintain such action, the plaintiff cannot in good faith proceed against the bail. It is like a licence to leave the limits, which, though given without any consideration, if carried into effect, not only exempts the sheriff and his bail from all liability for the escape, but discharges the debt itself; although before the prisoner actually departs, the licence is undoubtedly revocable. (16 Johns. R. 181.) The cases of a mere omission of the creditor to sue the principal debtor, where he has not been requested by the surety to proceed, or has entered into no contract which prevents him from proceeding, are not applicable to this case. (13 Johns.

R. 174. 15 Johns. R. 434. 17 Johns. R. 384, 175. 13 Johns. R. 383.) Here the surety has been prejudiced by the active interference of the plaintiff.

Judgment reversed, and venire de novo.

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JACKSON, ex dem. E. C. Genet and others, vs. WOOD.

THIS was an action of ejectment for the recovery of a house and lot in the city of New-York, tried at the New-York circuit in October, 1826, before the Hon. OGDEN EDWARDS, one of the circuit judges.

The lessors of the plaintiff claimed title to a lot in Cherry-Street, adjoining the Franklin bank, under a conveyance from Mary Osgood, the widow and relict of Samuel Osgood, to Martha Brandon Osgood, her daughter, executed in consideration of natural love and affection, bearing date the 31st day of May, 1814. Edmund C. Genet married Martha Brandon Osgood in the summer of 1814, some months previous to the death of her mother. Before his marriage he was informed of the fact of the conveyance of the lot in question by Mrs. Osgood to her daughter, and spoke of it as an inducement to the marriage, observing that owning this pro-

held by the lessors and their co-defendants in that suit came to such defendants by decent or devise, and were assets in their hands to pay the debts of their ancestor, although the jury on the issue of *riens per decent* found against the defendants: it not appearing from the record that the fact in issue in the action of ejectment was in issue and decided in the former suit.

If a verdict in a former suit will stand, on the assumption that the issue therein was found in favor of the title set up in the second suit, such verdict and the judgment thereon are not *conclusive*.

Nor does it help a defendant in an action of ejectment that the title set up by the lessor was in *dispute* in the former action, if such title came in question only *collaterally*, and if it does not appear that the verdict is necessarily based upon the finding that the lessors had no title. That the jury found against the lessor must appear affirmatively and not rest in *inference*.

To make a record evidence to conclude any matter, it should appear from the record itself, that that matter was in issue; and evidence cannot be admitted that under such a record any particular matter came in question.

An estoppel cannot be created by parol evidence helping out a record; to constitute an estoppel by a former judgment, the precise point which is to create the estoppel must have been put in issue and decided, and that it was so put in issue and decided can appear by the record alone.

A record, verdict or judgment is not *conclusive* when offered as *evidence* to prove an issue of fact, and not brought forward by plea as an *estoppel*. The jury in such case may find against the facts so proved, if the other evidence in the case will warrant their so doing.

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perty there was no apprehension, in case of the marriage taking place, of her becoming a charge to his children by a former marriage. Title to the premises, was shewn in Mrs. Osgood as early as the year 1784, and a continued possession since that time.

The defendant resisted the recovery under a title derived by purchase at a sheriff's sale by virtue of an execution issued on a judgment recovered in this court in January, 1818, in favor of The President and Directors of the Manhattan Company against Walter Franklin Osgood, *Edmund Charles Genet and Martha B. his wife*, Samuel Osgood, an Juliana his wife, Susan K. Osgood, De Witt Clinton and Maria his wife, John L. Norton and Sarah his wife and Hannah Clinton; the said Walter, Martha, Juliana and Susan being charged as heirs and devisees, and the said Maria, Sarah and Hannah as heirs of Maria Osgood, deceased. The record of judgment signed and filled and docketed, an execution in pursuance thereof, and a deed of the premises in question from the sheriff of the city and county of New-York in pursuance of a sale under the execution, to James Sterling, bearing date 16th March, 1818, were produced and read in evidence, and a title deduced to the defendant in possession.

From the record of judgment it appeared that the defendants were sought to be charged as *the heirs and devisees of Mary Osgood*, deceased, on two promissory notes indorsed by her in her life time. Several of the defendants pleaded *riens per decent*, against whom judgment was taken for assets *quando acciderint*. The defendants Walter Franklin Osgood, *Edmund C. Genet and Martha B. his wife*, Samuel Osgood and Juliana his wife and Susan K. Osgood pleaded the general issue and *riens per decent* or devise. The plaintiffs replied, that these defendants had sufficient lands, &c. by descent and devise from Mrs. Osgood to pay and satisfy, &c. The cause was tried and the jury, besides finding for the plaintiffs, on the general issue, found, "that the said Walter, Martha, Juliana and Susan at the time of exhibiting of the bill within mentioned of them the said President and Directors of the Manhattan Company against them, the said Walter Franklin Osgood, Edmund Charles Genet and Martha B. his

wife, Samuel Osgood and Juliana his wife and Susan K. Osgood, who are impleaded as aforesaid, had and each of them had divers lands, tenements, and hereditaments by descent and devise from the said Maria Osgood, deceased, where-with they could, and might, and ought to have satisfied and paid the said several sums of money in the said declaration of them the said President and Directors of the Manhattan Company within mentioned," and they assessed the damages of the plaintiffs to the amount of \$6917 50. On this verdict a judgment was entered against all the defendants for the damages found by the jury, together with the costs of increase, "to be levied of the lands, tenements, and hereditaments which the said Walter Franklin Osgood, Martha B the wife of the said Edmund Charles Genet, Juliana, the wife of the said Samuel Osgood, and Susan K. Osgood, and each of them, at the time of the exhibiting of the said bill of the said The President and Directors of the Manhattan Company, had as well by descent as devise from the said Maria Osgood, deceased;" and of the lands, &c. which shall hereafter come to the hands of Maria, wife of De Witt Clinton, &c.

The execution commanded the sheriff to cause the damages recovered to be made "of the lands, tenements and hereditaments in his bailiwick which the said Walter Franklin Osgood, Martha B. the wife of the said Edmund Charles Genet, Juliana, the wife of the said Samuel Osgood, and Susan K. Osgood, and each of them, on the third Monday in October, in the year of our Lord 1815, (the day of the exhibiting of the bill of the plaintiffs,) had, as well by descent as devise from the said Maria Osgood deceased;" and that he should have those monies, &c. The execution was returned by the sheriff "satisfied."

The indebtedness of Mrs. Osgood to the Manhattan Company and to others, at the date of the conveyance, to her daughter, Martha Brandan Osgood, afterwards Mrs Genet, was shewn; and the last will and testament of Mrs. Osgood, bearing date 27th July, 1814, was read in evidence, by which, after giving sundry legacies and bequests to divers persons, the testatrix devised and bequeathed all the residue of her es-

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tate, real and personal, to her children, Martha B. Osgood, Juliana Osgood, Walter F. Osgood and Susan K. Osgood.

The plaintiff read in evidence a *remittitur* from the court for the trial of impeachments and the correction of errors, transmitting the transcript of the record in the cause of the Manhattan Company against the heirs and devisees of Mrs. Osgood, which had been removed into that court by writ of error; together with the order of the court *reversing* the judgment of the supreme court. The order of reversal was entered on the 6th April, 1824.

The defendant then proved the indebtedness of Mrs. Osgood to the Manhattan Company, on the particular notes set forth and described in the record of judgment of that company against her heirs and devisees, at the date of the conveyance of the premises in question to Martha Brandon Osgood.

When the evidence was offered herein before stated, of the knowledge of Edmund C. Genet of the conveyance of the premises in question by Mrs. Osgood to her daughter, Martha Brandon Osgood, previous to his marriage, and of his views in relation to the same, it was objected to by the defendant's counsel; who insisted that the lessors of the plaintiff were *concluded* by the verdict and judgment in the cause of the Manhattan Company against the heirs and devisees of Mrs. Osgood from denying that the premises in question came to Martha Brandon Osgood by descent from Mrs. Osgood. Upon that occasion, his honor the presiding judge ruled that the bill of exceptions attached to the remittitur read by the plaintiff was not evidence that the same subject matter now in issue was in issue, tried and decided in that suit; but, inasmuch as it did not appear by the record in that case that the validity of the conveyance to Martha Brandon Osgood, as against creditors, was in issue in that suit, it was competent for the defendant to give parol evidence thereof. To this decision allowing parol evidence, the plaintiff excepted. It was then proved, on the part of the defendant that on the trial of the said cause, the deed from Mrs. Osgood to her daughter, Martha Brandon Osgood, and two other deeds by her executed at the same time to two other of her daughters, viz. Susan K. Osgood and Juliana Osgood, of lots in the

city of New-York, also in consideration of natural love and affection, were given in evidence on the part of the defendants in that suit; that the distinct question before the jury on the trial of that issue was, whether the said conveyances, and especially the conveyances to Martha B. and Susan K. were or were not fraudulent and void as against creditors, and especially the plaintiffs in that suit, creditors of the said Maria Osgood, deceased; and whether the said lots were or were not assets in the hands of the defendants, or some of them, parties to that issue; that evidence was given on both sides touching the matter; that the contest between the parties was whether the solid lots were or were not assets; that the judge who presided on the trial of that cause, in a clear and decided charge, told the jury that the said three several conveyances by the said Maria Osgood to her said three daughters respectively, were fraudulent and void as against the plaintiffs in that suit, creditors of the said Maria Osgood, deceased; and that the premises conveyed to the said Martha B. and Susan K. were, notwithstanding the conveyances, assets of the said Maria Osgood, deceased, in the hands of the said Edmund C. Genet and Martha B. his wife, and the other defendants, parties to that issue, by descent or devise; and that the jury, in conformity to such charge, found a verdict for the plaintiffs in that cause.

After this evidence was given on the part of the defendant in this cause, the presiding judge intimated his opinion that, unless the plaintiff could controvert the same, the verdict in that cause, and the judgment thereon, was conclusive upon the lessors here, as to the validity of the conveyance to Martha Brandon Osgood. The plaintiff's counsel offering no evidence, the judge charged the jury that, if they found the facts to be as they had been testified to them, in relation to the enquiry on the former trial, as to the validity of the conveyance to Martha Brandon Osgood, then the verdict in the former suit, and the judgment thereon, were conclusive upon the lessors of the plaintiff, and a bar to a recovery in this cause. The plaintiff excepted to the charge, and the jury found a verdict for the defendant.

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A motion was now made to set aside the verdict. The cause was argued by

S. P. Staples and *D. B. Ogden*, for the plaintiffs, and by
W. Slosson, for the defendant.

By the Court, MARCY, J. It will be necessary, in the first place, to consider the nature and effect of the judgment obtained by the president and directors of the Manhattan Company, against the heirs and devisees of Mrs. Osgood. This corporation prosecuted Walter Franklin Osgood, Edmund C. Genet and Martha B. his wife, Samuel Osgood and Juliana his wife, Susan K. Osgood and other defendants, as heirs and devisees of Maria Osgood, deceased. All the defendants pleaded *riens per descent*. To the plea of the defendants, not named above, the plaintiffs took judgment *quando acciderint*; and to the plea of the above named defendants, they replied that they had lands, &c. by descent and devise from Mrs. Osgood, at the time of the commencement of the suit. The issue formed by this replication was tried by a jury, who found a verdict in favor of the plaintiffs. The finding of the jury, as entered on the record, is, that the said Walter, Martha, Juliana and Susan, at the time of exhibiting the bill of the plaintiffs against the defendants, had, and each of them had divers lands tenements and hereditaments, by descent and devise from Maria Osgood, deceased, wherewith they might and should have satisfied and paid the said several sums of money due the plaintiffs over and above their costs and charges. Upon this verdict, the plaintiffs prayed judgment, &c. *to be levied of the lands, &c. which Walter F. Osgood, Martha B. the wife of E. C. Genet, Juliana the wife of Samuel Osgood, and Susan K. Osgood, and each of them, had, at the time of exhibiting the plaintiffs' bill by descent or devise from Maria Osgood, deceased*; and judgment was entered according to the prayer of the plaintiffs.

The execution on which the sheriff sold the premises in question, was pursuant to the judgment. He was, by that writ, commanded to raise the amount of the judgment from the lands, tenements and hereditaments, which Martha B.

wife of E. C. Genet, and the other defendants had by descent or devise from Maria Osgood, deceased. He could sell no other lands than such as they thus held, because the judgment extended only to these; and if he did in fact sell others, the sale was without authority, and without effect on the title of the owner.

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Whether the premises in dispute were or were not lands descended from Mrs. Osgood to her heirs, or were devised by her, is a matter, it is said, which cannot now be drawn in question, because it was distinctly passed on in the former suit, and these premises were found to be such lands. It is insisted that the lessors here having been defendants there, are concluded by the verdict and judgment in that case. After the judgment and proceedings in that suit had been introduced, the circuit judge decided that it was competent for the defendant here to shew, by *parol evidence*, that the validity of the deed of Mrs. Osgood to her daughter, Martha B., under which the plaintiff derives title, was in question in the former suit. Under this decision, evidence was received to shew, that in the former suit the validity of this deed and of two others given by Mrs. O. to two other daughters were in question, and that proof was there given to establish their invalidity; and that the judge, on the trial of that suit, charged the jury that the evidence proved the deeds to be fraudulent against creditors, and that the jury found a verdict for the plaintiffs.

The defendant in this suit having shown these facts in relation to the former suit, the circuit judge, on the trial in this cause, called on the plaintiff's counsel to contradict them. This they could not, or did not do. The judge then decided that the finding of the jury in the former suit was conclusive against the right of the plaintiffs to the premises in question. The motion now made for a new trial, rests principally upon the alleged error in this decision of the circuit judge.

There is nothing upon the face of the record in the former suit, to shew that the plaintiff in this suit is concluded by it. It only appears from that judgment, and the verdict rendered in that suit, that the lessors of the plaintiff, with the other defendants before named, had lands by devise and descent

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from Maria Osgood, that were assets in their hands liable for her debts ; but it does not appear any where on the record, that the premises in question were a part of these lands so descended or devised. If, in truth, these premises were the lands, or any of them which the jury in the former trial found to be such assets, a judgment might, and, it is insisted, should have been so entered as to manifest that fact. (Lilly's Entries, 504.) As the record is now made up, it affords no evidence as to the lands which the jury found to have descended from Mrs. O. to heirs and devisees. It was not necessary, I apprehend, that it should designate the lands, to render the judgment binding on them. There was no more necessity to describe them particularly in the record, to make the judgment a lien on them, than there is to set forth in the record of an ordinary case the defendant's lands in order to have them bound by a judgment against him.

If a purchaser at a sale under this judgment has bought lands that were not devised, or did not descend to the defendants, he has acquired no title ; but if he has bought such lands, he can establish his claim to them, by showing that fact. The defendant having derived title to the premises by a sale under the judgment in favour of the Manhattan Company, stands in the relation of a privy, and the record and judgment in that suit are as available to him as they could be to that company. (4 Com. Rep. 276. Archb. Civil Pl. 400. Co. Litt. 352, a.) It becomes necessary then to inquire what is the effect of this record and judgment, when offered as evidence in this suit. The rule upon this subject, as laid down by Ch. J. De Grey, in the case of the Dutchess of Kingston, (20 State Tr. collected by Howell and others, 538,) has been uniformly acknowledged since its decision as correct, except, perhaps, that part of it which regards the conclusiveness of a judgment when offered as evidence under the general issue. "The judgment of a court of concurrent jurisdiction directly on the point, is, as a plea, a bar and evidence conclusive between the same parties, upon the same matter, directly in question in another court ; and a judgment of a court of exclusive jurisdiction is in like manner conclusive between the same parties on the same matter, whether directly in point

or coming collaterally in question for a different purpose; but a judgment is no evidence of a matter which comes collaterally in question merely, whether the court be of concurrent or exclusive jurisdiction: nor is it evidence of a matter incidentally cognizable, nor of a matter to be inferred by argument from the judgment." Where the judgment pleaded or offered in evidence is in the same court, its effect probably is the same as a judgment of a court of concurrent jurisdiction. The party is concluded only as to those facts which appear from the record to have been in issue. Lord Ellenborough says, in *Outram v. Morewood*, (3 East, 346,) "A recovery itself in an action of trespass, is only a bar to a future recovery of damages for the same injury; but the estoppel precludes parties and privies from contending to the contrary of *that point or matter of fact*, which having been once distinctly put in issue by them or by those to whom they are privy in estate or law, has been, *on such issue joined*, solemnly found against them." "The judgment which is the fruit of the action can only follow the nature of the particular right claimed, or the injury complained of;" and in trespass for damages for an injury to the possession, "it concludes nothing upon the ulterior right of possession, much less of property in the land (*unless a question of that kind be raised by the plea and a traverse thereon*;) and does not even give him (the plaintiff,) the means of obtaining that possession, for the disturbance of which he has obtained damages." Throughout the whole of his very able and elaborate opinion in this case, Lord Ellenborough is exceedingly careful to limit the conclusiveness of a former judgment to the identical matter put in issue by the pleadings. "A judgment therefore, he says, in each species of action is final only for its own proper purpose and object, and no further." Lord Kenyon ruled, in the case of *Sintzenic v. Lucas*, (1 Esp. C. 43,) that in order to make a record evidence to conclude any matter, it should appear that that matter was in issue, and this should appear from the record itself; nor should evidence be admitted that under such a record, a particular matter came in question. This opinion has the sanction of an express decision of this court. (*Manning v. Harris*, 2 Johns. R. 24.) In a case in Connecticut, Ch. J. Hosmer in-

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timates an opinion that an estoppel cannot be created by parol evidence helping out a record. (*Smith v. Sherwood*, 4 Conn. R. 276.) In that case, it is decided that, in order to constitute an estoppel by a former judgment, the precise point which is to create the estoppel should have been put in issue and decided; and that it was so put in issue and decided, should appear from the record alone. The same point has been decided in other cases in that court. (4 Day's R. 274, 431.) From these authorities, and many others which might be cited, if it was a position which needed corroboration, I conclude that if the defendant could have pleaded the former judgment as an estoppel, and had pleaded it with all allowable averments, his plea would not have shewn enough to create a bar to the plaintiffs' recovery; because it would not have appeared from the record that the fact now in issue was in issue in the former suit, and directly decided therein. It cannot be pretended that, as evidence offered under the general issue it can have a greater effect than when properly pleaded.

The precise and only issue in the former suit was, whether the lessors of the plaintiff and the other defendants in that suit had lands, &c. by descent or devise from Maria Osgood, that were assets, to pay her debts. That is not the issue in this suit. The issue here is, whether the lessors have a right to the possession of the house and lot, now known as No. 12, in Cherry street. It is said, and so it certainly appears from the parol evidence, that the lessors' title to that lot was in dispute in the former suit; but it came in question, as it will be perceived, collaterally; and it does not appear that the verdict necessarily stands upon the finding that the lessors had not title to these premises. Mrs. O. had conveyed other lands, which, it was contended, were conveyed, as well as the lot for which this suit is brought, in fraud of her creditors; and were also alleged to be held by the defendants as devisees or heirs, and therefore liable to be taken for the debt of the grantor. If it had been contended in the former suit, as it has been here, that Genet was a bona fide purchaser for a valuable consideration, by reason of his marriage with the grantee, of the premises, and it has been con-

ceded or adjudged that he was such purchaser, the verdict would not have been different from what it was. Proof that the conveyance by Mrs. O. to her daughter Juliana or Susan was void as against creditors, and that neither of them had alienated to bona fide purchasers for a valuable consideration, or that Mrs. O. died seised of other real estate, would have supported the issue upon the record, and entitled the plaintiffs to the same verdict which was rendered in that case. So far, then, from the fact now in issue, or the fact which it is now proposed to establish by the record and judgment, having been the precise point in issue in the former suit, it was not necessarily involved in that issue, and consequently not necessarily determined by the decision in that case.

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It was not pretended at the trial, nor on the argument, that this case is like one of those wherein the parties are precluded from again litigating the same matter which has been once in dispute, and submitted to a jury, whatever might have been their decision upon it. It will be perceived by the judge's charge that the lessors were not held to be precluded because their title had been in dispute, nor even because it had been passed on by the jury, but because it had been in dispute, passed on by the jury, and found, as it is alleged, invalid against the creditors of Mrs. O. It would be revolting to justice and common sense to maintain that the lessors are precluded from shewing any title to the premises, merely because the plaintiffs in the former suit, saw fit to attack that title and bring it into question, when it could be shewn that the attack was probably unsuccessful. It seems to be admitted that, before the lessors are precluded in this suit from shewing title to the premises by reason of what took place in the former suit, the defendant here must make it clear that the jury in that suit decided against the validity of the lessor's title. The issue sent down in this suit to be tried, which was whether the plaintiff had, at the time of instituting this suit, a right to the possession of the premises, was abandoned, as it were, and another one raised on the trial, which was, whether the deed of Mrs. Osgood to one of the lessors of the plaintiff had been found by the jury, on the trial in the for-

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mer suit, void as against the claims of the plaintiffs in that suit. How was this substituted issue maintained? Not by the record, because it could not be ascertained, as has been observed, by any part of it, that the title of the lessors was involved in that suit: not by the verdict, for that does not appear to have any reference to the premises now in controversy. But the parol evidence shews that the jury declared the premises to be lands descended to the heirs and devisees of Mrs. O. Is this shewn as a matter of fact or a matter of inference? To me, it appears to be a matter of inference. The plaintiffs in the former suit introduced proof to shew that the premises were lands descended, and the judge charged the jury that the fact was made out; but that the jury did find them to be such lands is an inference, a strong one, I admit, but still an inference, because the verdict, as we have seen, is not inconsistent with, and does not necessarily repel the assumption which the lessors may insist on, that the jury did not find the premises to be such lands. It seems to me to be correct to say, that the title of the lessors to the premises was a collateral fact passed on by the jury in the former suit; and what their determination upon that fact was, is to be inferred, by argument, from the judgment. Upon the authority of the rule established by Ch. J. De Grey, which is based in good sense and upheld by a vast number of adjudications, the decisions upon this title in the former suit, coming, as I conceive it did, collaterally in question, the finding of the jury therein being a matter of inference, is not conclusive upon the plaintiff here. It is to be borne in mind that it is not the precise adjudication in the former suit that is offered to conclude the plaintiff's right here, but one of the alleged grounds of that adjudication. Although the adjudication is certain, the grounds are not so; and it is well observed by Starkie, (*Treatise on Ev.* 1st vol. 202) "that a particular ground can never be inferred and relied upon, especially where its effect is to be conclusive." To ascertain that any thing was determined in the former suit touching the issue here, that decision must be decomposed, and the materials of which it is made, proved by parol evidence; and even after this is done, we are still without cer-

tainty that the matter now in dispute is a part of these materials. We can only infer that it was, and this inference is founded upon the sufficiency of the proof and the direction of the judge to the jury so to consider it, to have made it one of the grounds. But what is the sufficiency of that proof, if the position now contended for by the plaintiff is to be sustained, that Genet is a *bona fide* purchaser for a valuable consideration, by reason of his marriage with Martha B. Osgood? The character of the inference does not vary the application of the principle of law. Whether it be certain or dubious, it is equally inconclusive upon the plaintiff's rights.

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To make the judgment in the former suit conclusive against the title of the plaintiff here, would be, in my opinion, not only against the principle which declares that the parties are not concluded by what has been collaterally decided in a former suit, but against that which denies conclusiveness to any thing that is a matter of inference from the former judgment. The case of *Ryer v. Atwater & Wright*, (4 Day's Rep. 431,) contains an adjudication in confirmation of the principles before stated. The plaintiff in that case prosecuted the defendants for an assault and battery. They pleaded the general issue, and on the trial stated, as matter of justification, insulting language and the destruction of the property of one of the defendants by the plaintiff. They offered to prove the destruction of the property by the verdict against the plaintiff at the suit of one of the defendants for the property destroyed, and it was declared inadmissible. This decision was sustained by the supreme court of errors of Connecticut, on the ground that the same points were not in issue in the two suits. Swift, J. observes, that "It is true there is one fact which is the same in both; that is, the destruction of the property. When there are several distinct facts which constitute the *points* contested between the parties, no authority can be found that will warrant the admission of a verdict as evidence to prove one of several facts put in issue. *This distinction is founded in reason; for where the facts are different, the same points cannot be in issue.*" For a much stronger reason, a verdict, resting on several facts coming collaterally in issue, should not be received as conclusive in

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a suit involving in its issue one of these collateral facts. If, from the situation of the lessors in the former suit, they were deprived of any of the usual means of establishing their title; or of correcting the errors of the judge or jury in relation to it, they ought not to be concluded by the judgment in that suit. This, I apprehend, was their situation. Suppose the jury in the former suit had found, contrary to the weight of evidence, that Genet had no title to the premises; could he have corrected that error? If he had moved to set aside the verdict, he would have failed; for the verdict would have rested upon the evidence given as to the two other lots. To resist the motion successfully, it would have been sufficient to say that it appears satisfactorily that the deeds of Mrs. O. to her daughters Juliana and Susan, were void against the plaintiffs as creditors; and there is no proof that either of the lots conveyed to them had been alienated to bona fide purchasers for a valuable consideration. The defendants, Juliana and Susan, therefore, took these lots as heirs and devisees of Mrs. O.; and this is the verdict of the jury. If the judge had erred, as it is now insisted he did on the former trial, in instructing the jury that Genet had no valid title to the premises as against the creditors of Mrs. O., could the lessors have relieved themselves, in that suit, from the consequences of this misdirection? The answer which would probably have been given on the application for a new trial, and which might have been received by the court, would have been, that the verdict was sustained by the evidence in relation to the lots conveyed to Susan K. and Juliana Osgood; and if a new trial was granted for the purpose of correcting the error of the judge in relation to Genet's title to the premises, and it was corrected, the verdict would be the same. A new trial would therefore be a useless and expensive ceremony. (3 Johns. Rep. 526. 10 id. 447.)

There is another ground of objection to the judge's charge in this case; which is, that no record, judgment or verdict can be conclusive when offered as *evidence* to prove an issue of fact. It is said to be but evidence, and must go to the jury with all the other evidence offered by the parties to prove the issue joined; and the jury may find their verdict against the facts proved by

such judgment, record or verdict. The jury are bound by estoppel, unless the party leaves the fact at large by the pleadings. If it is so left, the jury may find against what, if pleaded as an estoppel, would be conclusive. (1 Salk. 276.) In the case of *Outram v. Morewood*, before cited, Lord Ellenborough says, "The plea would be conclusive that at the time of pleading the plea, the soil and freehold were in the defendant ; and if properly pleaded by way of estoppel, it would estop the plaintiff, against whom it was found, from again alleging the contrary. *But if not brought forward by plea as an estoppel, but only offered in evidence, it would be material evidence indeed, that the right of freehold was at the time as found, but not conclusive between the parties as an estoppel would be.*" In the case of *Vought v. Winch*. (2 Barn & Ald. 662,) it was decided by the King's bench that a former judgment, which if pleaded would be a bar, is not conclusive when offered in evidence under the general issue ; and that a second jury may decide against the verdict of the first. Holroyd, J. says, that " when the evidence of a former judgment is offered under the general issue, the jury are to try, not whether there was a former action for the same cause, but whether the plaintiff has such a ground of action as he has alleged in his present declaration. When it is put to the jury to find what the fact was, it is inconsistent with the issue joined, for the defendant to say that the jury are estopped from going into the inquiry." It is to be observed, that in these cases the defendants might have pleaded what they offered as evidence ; but in the present case, the usual course of pleading did not allow the defendant to present by a plea what he offered in evidence as conclusive ; but it does not seem very reasonable that this circumstance should vary the effect of the evidence when offered under the general issue.

There is some diversity of opinion as to the soundness of the distinction taken in these cases ; and we are not called on in this case expressly to adopt or reject it, because the other objections to the charge dispose of this motion for a new trial.

I consider the law as settled, that the reversal of the judgment under which the defendant holds the premises subse-

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I think the circuit judge erred in deciding that the judgment and proceedings in the cause of the President and Directors of the Manhattan Company against the heirs and devisees of Mrs. Osgood were conclusive upon the rights of the plaintiff in this suit, and that there ought therefore to be a new trial.

VAN STEENBERGH VS. BIGELOW.

Under the This was an action of *trespass*, tried at the Ulster circuit, in April, 1828, before the Hon JAMES EMOTT, one of the circuit judges.

The action was brought for the recovery of damages for the taking and appropriating of lands of the plaintiff for the use of the Bristol Turnpike Company, the defendant acting as the agent of the company; the plaintiff insisting that the company had not entitled themselves, by complying with the requirements of the statute relative to turnpike companies, (1 R. L. 230,) to take and appropriate his land.

The declaration contained the common count for trespass *quare clausum fregit*, and also a count for trespass *de bonis asportatis*. The defendant pleaded the general issue, and a special plea of justification under an act of the legislature incorporating the Bristol Turnpike Company. The plaintiff made inquiry.

An inquiry made by the plaintiff replied *de injuria sua propria*.

The plaintiff proved, that by the direction of the defendant, a turnpike road was made and constructed over his land, and shewed damage to a considerable amount.

proceeding; and if enough appears, shewing they had jurisdiction of the subject matter, the court will not collaterally, in action of trespass wherein it is alleged that the proceedings of the appraisers are irregular, inquire into the regularity of such proceedings; the party must seek his remedy by *certiorari*.

Nor in such action is evidence admissible, that one of the appraisers has not the qualification required by the act, to wit, the he is a freeholder. Such error, if any, must also be corrected by *certiorari*.

The second section of the act, "for the more easy pleading in certain suits," allows any matter to be given in evidence, which, if specially pleaded, would be a defence to the action; but not matter which would be no defence, though specially pleaded.

The defendant read in evidence the act of the legislature set forth in his plea; the appointment of commissioners to lay out the road; a map of the road made under their direction; the appointment of inspectors; and a licence to erect a turnpike gate. He also read in evidence an appointment by the first judge of Ulster county, of William Pine, Theron Skeel and James G. Wilson, as appraisers, and an inquisition by Pine and Wilson, two of the appraisers, (with their oaths annexed,) of the assessment of damages to the owners of lands taken and appropriated for the road: from which it appeared that the sum of \$75 was assessed to the plaintiff. The inquisition stated the appointment of the appraisers, the taking by them of the oath prescribed by the statute, the view by them of the premises, and that having ascertained the damages, they make on inquisition, "under the hands and seals of us, two of the said appraisers." The defendant then proved, that previous to the opening of the road, the sum assessed to the plaintiff was tendered to him by the secretary of the company.

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The plaintiff insisted that the inquisition was void, because only two of the appraisers had acted in the premises. The presiding judge expressed his opinion that the evidence given by the defendant constituted a defence to the action; that the objection to the regularity of proceedings, if well founded upon a direct proceeding to try their validity, could not then be urged; but, at the request of the plaintiff, he reserved the point for the opinion of this court. The plaintiff then offered to prove that Wilson, one of the acting appraisers, was not a freeholder at the time of his appointment; which evidence the judge refused to receive. Whereupon, under the point reserved, the plaintiff submitted to a nonsuit, with leave to move this court to set it aside.

Romeyn & Sudam, for plaintiff. The inquisition was irregular and void, only *two* of the three appraisers nominated having *acted* in the premises. *Each* of the appraisers should have acted. The statute relative to turnpike companies, (1 R. L. 230, § 3,) prescribes that *each* of them shall, before he proceeds to execute the trusts reposed in him, take and

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subscribe an oath, &c.; and then directs that the said appraisers shall proceed to view the premises, &c. It was not shewn, on the trial, that the third appraiser was sworn; that he took any part in, or even had notice of the proceedings. Admitting that a majority of the appraisers, when assembled, might have overruled the third, and that the finding of two would have been a compliance with the statute, it not having been shewn that the third appraiser took any part in the proceedings, the inquisition ought to be adjudged void. (1 Bos. & Pul. 226. 6 Johns. R. 39. 1 Johns. Cas. 334. 1 Cowen, 238. 7 Cowen, 526. 2 Bos. & Pul. 35. 3 Caines, 180. 8 Johns. R. 54.)

The validity of the inquisition was inquirable into in this action. (19 Johns. R. 39. 15 id. 152. 4 Cowen, 196. 2 Wils. 382. Cowp. 640. 16 Johns. R. 8. 8 T. R. 424. 13 Johns. R. 424. 1 H. Black. 68. 1 Starkie's Ev. 226, n. 1. 2 Phil. Ev. 251.) And it was competent for the plaintiff to shew that one of the appraisers had not the qualifications prescribed by the statute, (4 Cowen, 190. 7 Cowen, 530, n. a.)

The statute for the more easy pleading in certain suits, in cases like this, permits "the whole matter to be given in evidence" under general pleadings. (1 R. L. 155, § 2.)

C. H. Ruggles, for defendant. The inquisition of the appraisers, being a judicial proceeding, is *prima facie* evidence at least of the facts contained in it. It sets forth the appointment of *three* appraisers: that they took and subscribed the oath required; that they proceeded to view the premises; and that having ascertained the damages, &c. they make an inquisition under the hands and seals of two of them. It is not denied that the facts stated in the inquisition might have been controverted; but that was not attempted at the trial. The plaintiff assumes that the third appraiser was not sworn; the inquisition avers the contrary. (16 East, 20. 8 Johns. R. 50. 19 id. 39.)

But if it may be inferred that but two of the appraisers acted in the premises, it is insisted that it was not necessary, under the provisions of this statute, that all should join. The act authorises *the appraisers, or any two of them*, to name a

day for meeting on the land, and perform the duties required of them. The subsequent provision, requiring the appraisers to be sworn, is satisfied by those taking the oath who do act. The phraseology of this statute is different from those under which the adjudications have been had, cited by the other side.

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Allowing the proceedings to be subject to reversal on certiorari, still, being regular on their face, all persons acting under them, until reversal, are protected by them. (7 Johns. R. 549.) If the defendant is a trespasser, every person travelling the road is a trespasser. The fact of the appraiser not being a freeholder, could not be shewn in the manner attempted; it could only be inquired of by certiorari issued to the officer making the appointment. The acts of officers *de facto* are valid as respects the public and the rights of third persons. (9 Johns. R. 135.) The remedy afforded by a certiorari here, not obtained by that writ in England, furnishes a substantial reason, which does not exist there, why a judicial proceeding like that under consideration, should not be inquired into collaterally. In England the certiorari goes only to the form of the record, or the fact stated in it, (2 Salk. 492;) here not only the record, but the whole facts of the case are returned, and the court pronounced the law—as in the case of a *certiorari* to a court of sessions to remove an order under the poor act, (2 Cowen, 575,) or the bastardy act, (3 Johns. R. 23, 26.) So, to remove the proceedings relative to an adjudication under the highway act, (1 Cowen, 23,) or the statute of 1820, relate to landlords and tenants. Our courts look beyond the record, and if they find a radical defect in the proceedings, or discover a mistake of the law, they reverse. This adaptation of the writ of certiorari, rendering it so much more beneficial, should have an influence on these questions when arising collaterally.

By the Court, SAVAGE, Ch. J. By the third section of the act relative to turnpike companies, (1 R. L. 230,) all turnpike roads are to be laid out by commissioners to be appointed by

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the governor. The president and directors of the company may agree with the owners of the land over which the road is laid, as to compensation for the same. If they cannot agree, application must be made to one of the judges of the court of common pleas of the county where such land is situated, whose duty it is to appoint three appraisers, being freeholders of the county. The act then proceeds: "And it shall be the duty of the said president and directors to give notice to the said appraisers of their appointment, who, or any two of them, shall thereupon name a day for meeting on the land, and perform the duties required by this act," &c. The president and directors are also to give notice to the owner of the time and place of the meeting of the appraisers. "And further, each of the said appraisers shall, before he proceeds to execute the trusts reposed in him by this act, take and subscribe an oath or affirmation in writing," &c. The appraisers shall make an appraisal, and upon payment of the amount, the company may enter upon the lands.

The judge was certainly right in rejecting the proof that one of the appraisers was not a freeholder. Whether the appraisers were freeholders or not, was not enquirable into collaterally. Their appointment had been made by an officer whose duty it was to have appointed freeholders and no other. If he erred in that particular, the appointment might have been examined in this court on certiorari, and if illegally made, would have been set aside. The statute, (1 R. L. 155,) which, in certain actions, allows the whole matter to be given in evidence on general pleadings, cannot be construed to mean that any matter whatsoever may be given in evidence. The object of the statute was only to relieve parties from intricate special pleading, and not to allow matter to be given in evidence, which, if specially pleaded, would not be a defence.

The whole defence rests upon the construction to be given to the third section of the act relative to turnpike companies. The general principle is too well established to be controverted, that where three or more persons are appointed to do any

particular act, if it be a matter of private concern, and no provision is made that a less number than the whole shall act conclusively, then all must join; but in matters of public concern, a majority have power to *decide*, provided all *act* upon the matter. Thus commissioners of highways must all unite in consultation, but a majority may decide. So, a majority of referees may make a report, provided all have heard the cause. But in neither of these cases have two a right to act alone, without the third, though they may overrule him. The same rule has been applied to canal appraisers, and is applicable to this case, unless the statute has excluded it. The statute directs that the president and directors shall give notice to the appraisers of their appointment, *who or any two of them, shall thereupon name a day for meeting on the land and perform the duties required of them.* Had the words "*or any two of them,*" been omitted, it would have been necessary to have shewn that all the appraisers met and consulted together; but two of them in that case might have made a valid appraisal, although the third had expressly dissented. (7 Cowen, 526.) The legislature, I presume intended by the phraseology "*or any two of them,*" to confer upon the majority the powers which, in ordinary cases, would have devolved upon the whole, without those words. This seems to me the true construction of the act. *Any two of the appraisers* most clearly may name a day of meeting on the land; and, as I read the statute, *any two of them shall perform the duties required of them by this act.*

The inquisition made by the two appraisers must be taken as conclusive, certainly so far as it states their own proceedings. It states the appointment by the judge, which was not necessary to have been stated. It does not state a notice to the appraisers, but it states that the appraisers, on the day of their appointment, named a day for meeting on the land. Notice, therefore, may well be presumed, particularly as the object of the notice was accomplished by bringing together the appraisers, and procuring the designation of a day for meeting upon the land. The inquisition speaks of the appraisers

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throughout as if all were present ; though it appears that but two took the oath required before proceeding to execute the trust. It seems to me that two had authority expressly given them by the act to perform the duties designated.

By the inquisition, the proceedings appear to have been regular ; but if they were not, so long as a valid appraisal appears, we will not enquire collaterally into the proceedings of the appraisers. Enough is shewn to give them jurisdiction. The inquisition is on file, and a matter of record. If incorrect, it might have been set aside on certiorari.

I am of opinion, therefore, that the motion to set aside the nonsuit should be denied.

THE SUPERVISORS OF THE COUNTY OF ALLEGANY VS. VAN
CAMPEN and others.

A bond given by a treasurer of a county that he "shall well, truly, and faithfully execute and perform the duties of treasurer of said county according to law," is good, although not in the form prescribed by statute.

DEMURREK to pleas. The declaration is in debt on a bond conditioned for the faithful discharge of the duties of treasurer of the county of Allegany by Van Campen. Van Campen and six of his sureties united in the defence, and appeared by one attorney ; two of the remaining sureties, there being eight in the whole, appeared and defended by another attorney. Each set of defendants pleaded *fourteen pleas*. The pleas of each, however, were the same in form and substance.

If the variance were material, *it seems* it could not be taken advantage of by plea.

To a breach assigned that a treasurer of a county had wrongfully and fraudulently embezzled the public money and converted it to his own use, a plea that the treasurer had not been requested by the supervisors, or by any person authorised to make such request, to pay over the money is not good ; a defendant in such case having no right to require that a demand should be made previous to suit.

A plea that a treasurer was not requested before suit brought to pay over the monies in his hands, in answer to a breach that he refused to pay, although particularly requested so to do, is bad if it concludes with a *verification*.

The addition to such plea that the treasurer had not been called upon to account, is bad also for duplicity.

stance. The plaintiffs, in their declaration, after setting forth the bond and condition, assigned three breaches. The condition, as set forth, is in these words: "If the above bounden Moses Van Campen, appointed by the supervisors as treasurer of the county of Allegany, shall well truly and faithfully execute and perform the duties of treasurer of said county according to law, then this obligation to be void and of no effect, otherwise," &c. The breaches assigned are, 1. That Van Campen, as such treasurer, received divers sums of money, amounting in the whole to the sum of \$3000, raised in the county of Allegany for defraying the public and necessary charges thereof, and wrongfully and fraudulently embezzled and converted the same to his own use; 2. That Van Campen, as such treasurer, accounted with the plaintiffs of and concerning divers sums of money raised in the said county for defraying the public and necessary charges thereof, and which had come to his hands as such treasurer, and on such accounting was found to be in arrear and indebted to the plaintiffs in the further sum of \$3000, yet not regarding his duty, &c. afterwards wholly and absolutely refused to pay over the same to the said plaintiffs, *or their order*, although particularly requested so to do; 3. That Van Campen, as such treasurer, received, &c. \$3000, yet, not regarding his duty, wholly and absolutely refused to pay over to the plaintiffs, *or to their written orders*, the said sum, although particularly requested so to do.

The defendants pleaded, 1. *Non est factum*: 2. That the bond executed by the defendants is not conformable to the statute, and therefore void; 3. (being the fifth plea to the first breach,) That Van Campen was not requested by the supervisors, nor by any other person authorised to make such request, to pay over the money in the said breach mentioned, concluding with a verification and prayer of judgment; 4. (being the second plea to the second breach,) That Van Campen never was, before the commencement of the suit, called upon or requested by the said supervisors, nor by any person by them legally authorized, to pay over,

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&c. ; 5. (being the third plea to the third breach,) That Van Campen had not been requested by the supervisors, or by any person authorized to make such request, to pay over, &c. ; nor had he been called upon or requested by the said supervisors to render an account of the said money ; both the last pleas concluding with a verification.

To the four last pleas the plaintiff demurred : *generally* to the *second* and *third* pleas, and *specially* to the *fourth* and *fifth* pleas, as above classed. The special causes assigned are, that the pleas conclude with a verification, and that the last plea is double. The defendants joined in demurrer. Issues of fact were joined upon all the other pleas.

S. A. Foot, for plaintiffs. The second plea is bad. It presents a question of law, not of fact ; whether there be a variance between the bond as set forth in the declaration, and the form prescribed by the statute, is not an issuable fact which can be the subject of a plea. The fifth plea to the first breach is also bad. That breach alleges that Van Campen wrongfully and fraudulently embezzled and converted to his use the monies of the county. A plea that the defendant was not requested to pay over money thus held, is no answer to the charge ; for if true that he embezzled the money, it was not incumbent upon the plaintiffs to shew a special request before suit. The two last pleas are bad for the causes assigned in the demurrer ; the breaches assigned are, that Van Campen refused to pay to the plaintiffs, or to their order, although particularly requested so to do. The pleas put in issue the allegations of the plaintiffs, and therefore should have concluded to the country, and not with a verification. Besides, the last plea is bad for duplicity.

S. M. Hopkins, for defendants. The bond is variant from the form prescribed by the statute, (2 R. L. 139, § 5.) Although it may be said that, as far as it goes, the bond is conformable to the act, and that for a breach of it in those particulars the defendants are responsible, still the question is submitted, whether the statute should not have been strictly pursued.

The first breach charges the treasurer with *embezzlement*. The fifth plea to this breach meets the charge by saying he was not requested to pay over. It is the duty of the treasurer to *keep* the money until duly called upon by orders; his person is the *treasury*. Under the breach assigned, proof that he put the money into his pocket when he received it, would not subject him to the charge of embezzlement; and yet, unless embezzled then, the charge is not pleadable or traversable. Suppose he appropriates the *very money* received to the purchase of merchandize, and yet pays all orders drawn upon him; no action lies. When, therefore, the defendants say that the treasurer was not requested by the plaintiffs to *pay over* the money received, their answer is perfect, and the plea is good.

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The second breach is for not paying over to the supervisors or to their *order*. The second plea to this breach was intended to raise the question whether the treasurer was liable, or warranted to pay without a *written* order. If not, it should have been so averred. The general issue of *non est factum* would have admitted an order, though, in fact, none might have been made. The true question is whether an order was made and presented for payment; and the plaintiffs, by refusing to take issue upon this plea, admit that they have no cause of action.

The third breach is for *non-payment of orders*. The third plea to this breach is substantially, "you have given no orders to pay over; you have not called me to an account." In answer to this plea, the plaintiffs, instead of demurring, should have specified and set forth the orders. The allegation, that the treasurer was not called to an account, is mere surplusage. At law, you may demur for duplicity, but not for impertinence. If there be surplusage, it does not hurt the plea. An actual request in this case was essential to the support of the action, and a special request ought, therefore, to have been stated; the *licet sæpius requisitus* was not enough; it ought to have been shewn by whom it was made, and the time and place of making it, that the court

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might have judged whether the request was sufficient. (Comyn's Dig. Pleader C. 69, 70, &c.) The breach as averred, varied from the sense and substance of the contract ; which was, that Van Campen should pay, according to law, all monies which should come to his hands. Merely stating, therefore, that he refused to pay, without alleging that he was requested so to do by orders duly issued, was not enough. (Comyn's Dig. Pleader, 47, 48.) As to the verification, it was unavoidable ; the defendants were obliged thus to plead, or to abandon their defence.

Foot, in reply. The defendants might have discharged themselves from liability by averring a readiness at all times, by the treasurer, to pay the monies received by him. The question upon this point, argued by the counsel, does not arise under the state of the pleadings. It was not necessary that it should have been averred that the orders were *in writing*. That they were so may be supplied by proof. Nor will the plaintiffs be required to set out the particular orders, as it would lead to great prolixity of pleading. The last plea is chargeable with duplicity ; the plaintiffs could not have taken issue upon it, without presenting a new point in the case. As to the validity of the bond. Being given under a statutory provision, and the treasurer obligated to perform his duty according to law, the bond and the statute are in *pari materia*, and must be construed together. (5 Cowen, 468.)

By the Court, SUTHERLAND, J. The 2nd plea of the defendants sets up a variance between the bond given by the defendants and the form prescribed by the statute. The statute (2 R. L. 139, sect. 5) directs that the bond given by the treasurer of a county shall be conditioned as follows : " That he shall well and faithfully execute the office of treasurer of such county, and pay all monies which shall come to his hands as treasurer according to law, and render a just and true account thereof to the said supervisors, or to the comptroller of the state when required." The condition of the bond in this case is, " That the said Moses Van Campen shall

well, truly and faithfully execute and perform the duties of treasurer of said county according to law." There is nothing in the bond which is not prescribed by the statute, and it contains in substance every thing that the act requires. Its legal effect and operation is the same. It binds the treasurer to execute the duties of his office according to law, and one of his duties is to account for the monies received by him when required by the supervisors of the county or the comptroller of the state. The act does not declare that a bond in any other form than that prescribed shall be void as does the act "*concerning sheriffs and their duties*," (1 R. L. 423, sec. 13. *Strong v. Tompkins*, 8 Johns. R. 98.) The plea is therefore bad and the demurrer is well taken. But if the variance were material, I should doubt whether it could be taken advantage of by plea. It is not an issuable fact.

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The next plea demurred to is the 5th plea to the first breach. This breach, it will be recollected, charges Van Campen with having received as treasurer, large sums of the public money, amounting to \$3000, which it alleges *he wrongfully and fraudulently embezzled and converted to his own use*. The defendants plead in bar of this breach, that Van Campen has not been requested by the supervisors, or by any other person authorised to make such request, to pay over the money in the said first breach mentioned. The plea admits the fraudulent embezzlement as alleged in the breach, and answers it by averring that Van Campen had never been requested by the plaintiffs to pay over the money to them. Whether the term *embezzle* is sufficiently definite and precise to stand the test of a special demurrer may, perhaps, be questionable. But upon general demurrer it is sufficient: it means the appropriation to one's self, *by a breach of trust*, of the property or money of another. The term necessarily imports fraud and breach of trust. The treasurer was not entitled to a demand of the public monies in his hands, when he admitted that he had fraudulently appropriated them to his own use. The demurrer to this plea is also well taken.

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The cause of demurrer assigned to the 2d plea to the second breach is, that it concludes with a *verification*, whereas it should have concluded to the country. The breach alleges that Van Campen accounted with the plaintiffs and was found to be in arrear and indebted in the further sum of \$3000, and that not regarding his duty, &c. he wholly and *absolutely refused to pay over the said last mentioned sum of money to the said plaintiffs or their order, although then and there particularly requested so to do.* The plea avers than Van Campen never was requested to pay over the money in his hands, &c. and concludes with a *verification*. I am inclined to think that the allegation in the breach of a *request* or demand is sufficiently explicit to amount to a positive averment, and that the plea should have concluded to the country; and is therefore bad on special demurrer. The 3d plea to the third breach is also bad for concluding with a *verification*; besides it is double. Judgment for plaintiffs on all the demurrers, with leave to defendant to amend.

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In an action on a *replevin bond* it is not necessary to allege the title or estate of the defendant in the action of replevin in and to the premises, for the rent of which the distress was made; nor to

aver the making of an affidavit previous to a distress for rent in the city of New-York; nor to state the avowry or cognizance.

Although a party takes judgment for a return of the goods, he is entitled to an assignment of the replevin bond. And any defendant in a replevin suit, in case of distress for rent, is entitled to such assignment.

The condition of the bond, that the party shall prosecute his suit *with effect*, is broken when judgment passes against him; and the defendant in the suit, in such case, is entitled to an assignment of the bond.

A return of the goods to the sheriff is no answer to the action. The return required by the bond is a return to the party from whom they were taken, in pursuance of the judgment of the court, not a mere re-delivery to the sheriff.

Replevin bonds are not within the meaning of the act requiring an assignment of breaches and an assessment of damages. The judgment is entered for the *penalty*.

The form of a declaration in an action on a *replevin bond* approved.

replevin for the taking of the goods ; that the sheriff took a bond from the defendants in double the value of the goods (the value having been duly ascertained) to him in the name of his office, in the sum of \$1740, to be paid to him, &c. or assigns, reciting the bond and condition in the usual form) and made deliverance of the goods to E. B. Gould. That at the next court of common pleas, E. B. Gould appeared and declared, (in the usual form of a declaration in replevin,) that at a subsequent term such further proceedings were had, that it was considered and adjudged by the said court, that the said plaintiff should have a return of the said goods, as by the record and proceedings more fully appears. The plaintiff then avers that the said E. B. Gould did not make a return of the said goods according to the form and effect of the condition of the writing obligatory, but wholly neglected and refused, and still neglects and refuses so to do, whereby the bond became forfeited to the sheriff ; and that afterwards, on, &c. the sheriff duly assigned the same to the plaintiff, whereby an action hath accrued to the plaintiff, to demand and have the said sum of \$1740. Yet, &c. (common conclusion.)

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The defendants pleaded that on the deliverance of the goods by the sheriff, they were deposited by E. B. Gould, one of the defendants, in the custody of Gould and Cumming, the other two defendants, as an indemnity and security to them for the forth-coming of the same, in case a return should be adjudged in the replevin suit. That afterwards, at or before the day when the said goods ought to have been returned and delivered according to the condition of the bond, they, the defendants, did make a return of the same to the sheriff of New-York, who took the same away, and of this they put themselves upon the country.

The plaintiff demurred, and the defendants joined in demurrer. The court decided in favor of the plaintiff, who took judgment for the penalty, six cents damages and the costs of increase. On this judgment a writ of error was sued out.

S. D. Craig, for plaintiffs in error. The declaration is defective in not averring a right, originally to make the dis-

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treas; the party should have stated a *precise sum* due to him for rent, and verified the same by affidavit, and he should have set forth the estate of which he was seized. In England a more general form of pleading is allowed by a statutory provision, which has not been adopted here. (1 Johns. R. 380. 10 id. 424.) Without shewing the estate of the landlord and the right to distrain, no right to the assignment of the bond appears. The plea might have been property in a stranger, upon which the defendant in replevin might have judgment of return; but not having *avowed* or made *cognizance*, would not be entitled to an assignment of the bond. The judgment taken by the defendant in the replevin suit was a judgment of *retorno habendo*; having taken the common law judgment and not pursued the remedy given by statute, he is bound to proceed against the sheriff and his pledges, under the fourth section of our act. He was not entitled to an assignment of the bond, the plaintiffs in the replevin suit having appeared and prosecuted, and given him an opportunity to obtain his rent, if he was entitled to any, in one of the modes prescribed by the statute; and he having neglected to avail himself of the remedies given by the statute, is now limited to the proper and appropriate remedy of *retorno*, and the remedy against the sheriff and his pledges. It is said in some cases, that the avowant in replevin, for *want of a plea in bar*, may stop short, take an assignment and sue the sureties, because the plaintiff has not prosecuted his suit *with effect*. The plea in this case meets the breach assigned, and shews the bond not to have been forfeited. That could only have been shewn by averring the issuing of the writ of *retorno* and a return of *elongata*. This averment was essential. (18 Johns. R. 435.)

H. W. Warner, in pro. per. The declaration is good, and according to approved forms. (2 Chitty's Pl. 218. 3 id. 244.) But the plea is bad. In the first place it alleges a *return* (so called) to the sheriff, not after judgment, and a writ of *retorno habendo* issued, but *at or before* the day when the goods ought to have been returned, leaving the time wholly indefinite, whether before or after judgment, and con-

taining no averment of the issuing of such writ, in satisfaction of which the return was made.

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The judgment in this case is correctly entered for the *penalty*. Where the statute calls for an inquiry of damages, it is with a view to *execution*, not to the amount of the judgment. (1 Archb. Pr. 64. 2 Sellon's Pr. 177. 8 Johns. R. 111. 15 id. 474. 6 Cowen, 57. 1 Taunt. 218.) And an entry of an award for such inquiry may be *after* the judgment. (14 East, 401.) In case of a judgment on demurrer, the statute specially contemplates such enquiry. (1 R. L. 518.) If, however there be any irregularity in the case, it is an irregularity of execution, which is not available in error. (3 Johns. R. 141. 2 Cowen, 31.)

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The case is not within the statute, and an inquiry is not necessary. The statute has provided a special mode of ascertaining the value of goods distrained for *rent*, prior to the giving of the bond. (1 R. L. 93.) There is, therefore, no use in assigning breaches and assessing damages after judgment. The statute, in the same section, provides that the court may by rule give such relief to the parties upon the bond as shall be agreeable to justice: and that such rule shall have the nature and effect of a defeasance to such bond. Thus the party is protected from all exaction, and the landlord limited to his just demands against the principal debtor. But it is settled, on authority, that an assignment of breaches is not necessary in an action on replevin bond, any more than in the case of an action on a bail bond. (Dunlap's Pr. 390. 2 Bos. & Pul. 446. 3 Maule & Selw. 155.) If, however, an award of inquiry ought to have been made, the court will permit the requisite entries to be made, agreeably to the case of 14 East.

In answer to the other side, the averment in the declaration of the issuing of the writ of *retorno habendo*, is unnecessary. (2 Chitty's Pl. 222, n. b.) The fact of an avowry or cognizance need not be stated, even under the English statute; (2 Chitty, 221, n. z; 2 Sellon's Pr. 178;) and surely it cannot be necessary under our's, which directs an assignment, not merely as in the English statute, to the avowant or person making cognizance, but to the *defendant* in such ac-

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tion. It is immaterial, therefore, whether property be pleaded or not.

By the Court, MARCY, J. The principal questions in this case relate to the alleged defects in the declaration. The plaintiffs in error seem to have applied to it the rules of pleading in a replevin suit, and to have confounded them with those relating to suits on replevin bonds.

It was not, I apprehend, at all necessary for the plaintiff below to aver in his declaration the making of an affidavit of the amount of rent due, as required by the act concerning distresses for rent in the city of New-York, (Statutes, vol. 3, 156 c.) In an avowry in a replevin suit it may be necessary, but not in declaring on the replevin bond. The same remark disposes of the objection to the declaration, that it does not allege the title or estate of which the defendant in the action of replevin was seised. This is requisite in an avowry, but not in the declaration in a suit on a replevin bond.

The declaration should set out concisely all the proceedings in the replevin suit, and the failure in fulfilling the condition of the bond; but it is not necessary to state the avowry or cognizance. (Saunders on Pleading & Ev 769, 70. 5 T. R. 195. 2 Chit. Pl. 460.) In the suit on the replevin bond, the court cannot entertain questions as to the sufficiency of the pleadings in the replevin suit, especially as these pleadings are not spread, and by long practice and approved mode of pleading, are not required to be spread upon the record in the suit on the replevin bond.

It is urged, on the part of the plaintiffs in error, that the defendant should have stated in his declaration in the court below the avowry or cognizance, as otherwise it cannot appear that he was entitled to an assignment of the bond. Whatever force this objection might have in proceedings under the British statute, I think it can have none in proceedings under our replevin act. The statute of 11 Geo. 2. ch. 19, sec. 23, authorises the assignment of the replevin bond to the avowant or person making cognizance; but our statute is broader; it allows assignments to *defendants*, avowants and

cognizors. (1 R. L. 94.) All that is necessary, therefore, to shew upon the record, to entitle a person to prosecute in his own name upon a replevin bond is, that he was the defendant in the replevin suit, and had a judgment therein.

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It is further urged, that the defendant having taken the common law judgment for the return of the replevied goods, and having neglected to avail himself of the statute providing for an inquiry by the jury into the amount of rent in arrear and the value of the goods distrained, and to take judgment in the replevin suit therefor, must proceed according to the common law, against the sheriff to get a return of the goods, and is not at liberty to avail himself of the provision of the statute authorizing the assignment of the bond.

There are many cases in the books to shew that where the plaintiff takes judgment for the return of the goods, he is entitled to an assignment of the replevin bond. The case of *Gwillin v. Holbrook*, (1 Bos. & Pul. 410,) where the judgment in replevin was in this case, simply for a return, the plaintiff prosecuted as the assignee of the replevin bond, and his right to sue in that character was not questioned. In a late case, *Turner v. Turner*, (2 Brod. & Bing. 107,) the plaintiff, after a judgment for the return of the goods, took an assignment of the bond; and the court say, that although it appears from the declaration that a return of the goods, &c. was awarded, yet the avowant has his election whether he will proceed by a writ *de retorno habendo*, or by the course he has pursued; namely, the issuing a writ of inquiry under the statute. It is true, that in this case, in addition to taking the common law judgment *de retorno habendo*, the plaintiff had executed a writ of inquiry, and had judgment for his costs and the arrears of rent. This case not only shews that after the plaintiff has taken the common law judgment for a return, the replevin bond may be assigned; but it refutes the position of the plaintiffs in error, that the proceedings under the statute to assess damages and award execution, are a supersedeas or a defeasance of the bond. The court expressly say, that it is clear from the language of the act, that the legislature meant to give the avowant, or person making cognizance, a further and additional security, and to

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place him in a better situation than he was in under the law as it stood before the act was passed. Our statute does not confine this advantage to an avowant or cognizor, but extends it to every defendant in replevin in case of a distress for rent.

Before the act authorizing the assignment of replevin bonds, defendants in replevin suits who had obtained judgments, were driven to pursue their remedies by intricate proceedings against sheriffs, if insufficient pledges had been taken; or to carry on their suits, in case the pledges were sufficient, in the name of the sheriffs. To remove the delays and inconveniences of such a course of proceeding, the act was passed. The object of allowing the assignment was, to aid in enforcing the common law judgment, and not merely, as is contended on the part of the plaintiffs, to procure the appearance of the plaintiff in replevin. The books are full of cases in which it appears that assignments of bonds have been taken, and suits maintained upon them in the name of the assignees, where the plaintiffs in the replevin suits have appeared therein, and even after judgments have been obtained against them according to the provisions of the statute of 17 Charles 2 ch. 7. In *Perreau v. Bevan*, (5 Barn. & Cress. 284,) after a full discussion and an extensive view of the cases, it was decided that the plaintiff in a replevin bond suit having elected to proceed under the statute, and after he had actually proceeded under it to execution, was not confined to that remedy alone, but might take an assignment of the replevin bond and go against the sureties, or might proceed against the sheriff (who in that case had lost the bond) for his negligence in losing it.

Another objection urged against the sufficiency of the declaration is, that it does not shew a forfeiture of the bond. The bond, it is said, is not forfeited till there has been a default in not returning the property, and that the sureties are not bound to return it until properly called on for that purpose by a writ *de retorno habendo*. This objection proceeds upon a mistaken notion as to the condition of the bond. It is not merely for the return of the goods, but it is that the plaintiff in replevin shall prosecute

his suit *with effect*. The bond is forfeited, and the *defendant* in the replevin suit may take an assignment of it when he has obtained judgment against the *plaintiff* in the replevin suit. (5 Barn. & Cres. 284. Carthew, 248. 519. 1 Bos. & Pul. 140. 2 Wilson, 41.)

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Having adjudged that the objections to the declaration are not well founded, the plea is next to be considered. If the bond is forfeited, as the authorities show it is, by the unsuccessful prosecution of the replevin suit, the plea, which only sets up a return of the goods to the sheriff according to the condition of the bond, is no answer to the action. It does not answer for the non-fulfilment of that part of the condition which relates to prosecuting the replevin suit *with effect*. Besides, the plea does not, I think, state a sufficient return. The return mentioned in the bond is not a re-delivery of the goods to the sheriff; but is the return ordered by the judgment of the court in the replevin suit; and that judgment is a return to the person from whom they had been taken by the sheriff.

The only remaining question to be considered in this case is whether, there is any error in entering judgment for the penalty of the bond without assigning breaches and assessing damages. If a replevin bond is within the operation of the 7th section of the act for the amendment of the law, (1 R. L. 518,) the entry of the judgement, as it is on the record in this case, without assigning breaches and assessing damages, is erroneous. Replevin bonds have been put on the same footing with bail bonds, and are considered not to be within the meaning of that act (3 Maule & Selw. 155. Dunlap, 390.) It is also stated by Mr. Sellon, that the penalty of the bond, if forfeited, is a debt, and judgment must be entered to the full extent of it. (2 Sellon, 177.) The sureties are answerable to the amount of the goods replevied, and this amount is ascertained before the bond is given; there is, therefore no necessity for a jury to inquire into the matter.

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There is another reason for exempting replevin bonds from the operation of the act for the amendment of the law. The very act which directs the bond to be given, and makes it assignable, provides, "that the court may by rule give such relief to the parties upon such bond as shall be agreeable to justice." (1 R. L. 94.)

I am therefore of opinion that the court decided correctly, that the plea was insufficient; and that there is no error in entering the judgment in the court below to the full amount of the bond.

Judgment affirmed.

RICE vs. MATHER, survivor, &c.

Where A. and B. exchange notes for the purpose of raising money, and A. obtains the note of B. to be discounted at a premium exceeding the lawful rate of interest, such transaction is not usurious, and cannot be set up in bar of a recovery in an action by the purchaser of the note against B. the maker.

THIS was an action of assumpsit, tried at the Albany circuit, in August, 1828, before the Hon. JAMES EMOTT, one of the circuit judges.

The plaintiff sued as the first endorsee of a promissory note made by the defendants, Elias Mather and Finlay McNaughton, to Jasper L. Keeler and James G. Mather, under the partnership name of "Keeler and Mather," for the sum of \$948,50, dated 3d October, 1825, payable 90 days after date, and endorsed by the payees on the day of its date. The defendant pleaded the general issue.

The defence set up was usury. James G. Mather, one of the endorsers, testified that on the morning of the 3d October, 1825, Keeler and Mather and Elias Mather and Company made an exchange of notes, each of the firms giving the other a note of \$948,50, (the note declared on being the note received of Mather and Company.) Money, he said, was at that time very scarce in Albany. Neither note was to be returned, but both were to be paid. Having thus obtained the defendants' note, he called on the plaintiff and enquired if he had any money to let, to lend or to spare; to which the plaintiff answered "he did not know, but guessed he had." In less than an hour afterwards, he called on the plaintiff with the note in question, endorsed by Keeler and

Mather, and observed to the plaintiff that "he thought that was a good piece of paper." The plaintiff said he thought so too ; took it and made a calculation of interest, and then said, "I suppose you know my terms." The witness answered that he did not. The plaintiff stated it was double interest or double bank discount, and at the same time said that he could lend the money to a person, who was then a bank director, on the same terms. The witness said he would take the money, and looking at the calculation, found that the sum of \$30,82 was discounted. He received the balance. Keeler and Mather failed before the note became due, and the defendant Mather has stopped payment.

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The plaintiff proved that Keeler and Mather, and another firm with which they were connected, viz. "Keeler and Rogers," made assignments of their property, on the 22d and 29th October, 1825, for the benefit of certain creditors ; that in a class of creditors provided for by those assignments, the defendants are included ; and that from the monies collected, and which would probably be collected, those creditors would receive from five to six-sixteenths of their debts. The note of Mather and Keeler is now held by the defendants. A verdict was taken for the plaintiff, subject to the opinion of this court.

S. A. Foot, for plaintiff. The note being an available security in the hands of Keeler and Mather, the subsequent transfer was no more than a sale of the note, and although sold at a discount of twelve per cent. the transaction is not usurious. There is no express authority as to the effect of an exchange of notes ; but a mutual promise is a good consideration for a contract. The failure of one party to perform his contract does not discharge the other. The note received by the defendants is available to the amount of 45 per cent. The notes, in an action between the original parties, might probably be set off against each other ; but the failure of one is no discharge of the other. The decision of this court in 15 Johns. R. 44, is considered as conclusive upon the question, that if a note is once available to the holder, a subsequent transfer of it, upon terms hard and oppressive, will not render it usurious.

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J. T. B. Van Vechten, for defendant. In *Floyer v. Edwards*, (Cowp. 112,) Lord Mansfield admitted evidence to shew that in the transaction in that case, there was no intention to cover a loan of money. He, however, observed, that the view of the parties must be ascertained, to satisfy the court that there is a loan and borrowing; that the substance was to borrow on the one part and to lend on the other; and were the real truth is a loan money, the wit of a man cannot find a shift to take it out of the statute. This exposition of the statute is cited with approbation in *Dunham v. Dey*, (13 Johns. R. 44.) Apply the rule thus laid down to the circumstances of this case, and the note in question must be declared usurious. It was made for the purpose of borrowing money. The object of Mather was to borrow; of Rice to lend; and in the language of Lord Mansfield, in real truth, it was a loan of money.

The note was made for the purpose of raising money on it. When it became payable, had it not been discounted, the payees could not have sustained an action on it against the maker; and being discounted at a higher premium than the legal rate of interest, the transaction is usurious and the note void. (17 Johns. R. 176.)

Foot, in reply. The maker of the note cannot object usury between the payee and the endorsee. Conceding the notes were made for the purpose of raising money, after the exchange, they were the absolute property of the holders. Neither note was to be returned; both were to be paid. On the trial of the cause, the defendant held the note of Keeler and Mather, which was then good, to a certain amount; and to that amount, a defence could not have been made, even in a suit by the original payees.

By the Court, SAVAGE, Ch. J. The only question is whether this was a usurious transaction. According to the uniform decisions of this court, it clearly was not. The note was given for a valuable consideration; it was an available instrument in the hands of the original payees; there was no usury in its original concoction, and therefore a purchase of it, or a discounting of it, at a sum less than the face, does

not taint the note itself with usury. Usury to invalidate the note, must exist between the original parties to it; but when as between maker and payee, the maker has received value for the note he gives, it is of no consequence to him what price the holder gave for it. He had value himself, and therefore must pay it. When a note is made, not upon valuable consideration, but for the purpose of having it discounted at a rate exceeding lawful interest, then the usury entering into its concoction, it is void. So, had it been agreed in this case, after James G. Mather called on the plaintiff and ascertained his terms that such a note as the one in question should be produced for the purpose of being so discounted, and the defendant had lent his name to accommodate James G. Mather or Keeler and Mather, there can be no doubt that the note would have been usurious and void. This distinction runs through all the cases. *Dunham v. Dey*, (13 Johns. R. 40,) was a case where a number of notes were given upon a previous usurious contract; there the notes were held void. *Munn v. Commission Co.* (15 Johns. R. 44,) was a case of a different description; the bill in the hands of the payee was an available instrument, and had he retained it till due, he might have maintained a suit upon it; it was sold to the plaintiff for near \$150 less than its face, though it had but sixty days to run, yet that was held to be a purchase of the bill, not a loan to the acceptor. In that case Mr. Justice Spencer said, "The principal is too well settled to be questioned, that a bill free from usury in its concoction, may be sold at a discount, by allowing the purchaser to pay less for it than it would amount to at the legal rate of interest for the time the bill has to run." I know of no case containing a contrary doctrine; and this seems to me entirely decisive of this case. The plaintiff is entitled to judgment.

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BOOTH vs. SMITH.

The acceptance in full satisfaction by a creditor of the note of a third person for the whole amount due on a previous note given by his debtor, is an extinguishment of the original consideration: and such acceptance may be plead in bar to a recovery on the original note.

DEMURRER to plea. The declaration is in *assumpsit*. The first count is on a due bill, made by the defendant to the plaintiff, for the sum of \$400, dated 17th March, 1826, payable on demand. The declaration also contains the common money counts. The defendant to the first count pleaded, that before the commencement of the suit, to wit, on the 15th April, 1826, an account was stated between the plaintiff and defendant, of and concerning the money in the said first count mentioned; that the defendant was found in arrear, and indebted on account thereof in the sum of \$270, for which sum, he then and there delivered to the plaintiff a promissory note, made by A. D. Jones, S. D. Jones and Andrew Jones, bearing date the 15th April, 1826, by which the makers promised to pay to him, the defendant, or bearer, one year after the date thereof, the sum of \$270 with interest; that at the time of the delivery of the last mentioned note to the plaintiff, he, the defendant, endorsed the same and ordered the contents thereof to be paid to the plaintiff; that the plaintiff then and there accepted and received the said last mentioned note for and on account and in full satisfaction of the note in the first count of the declaration mentioned. By reason whereof, the makers of the note and he, the defendant, as the endorser thereof, then and there became and still are liable to pay the same, according to its tenor, concluding with a verification and prayer of judgment, &c. The plaintiff demurred, and the defendant joined in demurrer.

J. B. Booth, in pro. per. When a defendant gives his own note for a precedent debt, the plaintiff may declare upon the original consideration and recover upon it, provided the new note be produced at the trial and cancelled. (8 Cowen, 77. 15 Johns. R. 247.) The endorsement of the note of third persons, and the admission in the plea of the

defendant's liability to pay, in pursuance of his endorsement, is equivalent to the giving of a note for a precedent debt, and creates no rights or liabilities different from what would have been created by the giving of a note. This case is distinguishable from that of *Kearslake v. Morgan*, (5 T. R. 513,) in which there was no admission that the defendant was *still liable* to the plaintiff to pay the amount of the new note. Indeed the argument of Bailey, who supported the plea in that case mainly, proceeded on the ground that the note which had been endorsed might have been paid, or endorsed over, and the defendant subjected to an action at the suit of the endorsee. Not so here; the note remains with the plaintiff and the defendant admits his liability to pay. How then is this case distinguishable from that of 8 Cowen? Nor is this case like that of *Boyd & Suydam v. Hitchcock*, (20 Johns. R. 76.) There the plaintiffs were held precluded from recovering beyond the sum which they had agreed to accept in satisfaction of their demand. Here the plaintiff does not ask to recover beyond the amount of the new note, but contends that he may recover that amount under the old note by delivering up the new note to be cancelled.

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J. R. Van Duzer, for defendant. Had the note of the defendant *alone* been given to the plaintiff in satisfaction of the amount found due, so that the extent or character of his responsibility would not have been changed, the plea would not have been good as in 8 Cowen, 77. Here, however, the defendant parted with a subsisting demand against *third persons*, which the plaintiff received *in full satisfaction*. Although accord and satisfaction may be given in evidence under the general issue, it may also be pleaded. (1 Chitty's Pl. 474, 5.) The cases of *Boyd & Suydam v. Hitchcock*, (20 Johns R. 76,) and *Le Page v. McCrea*, (1 Wendell, 164,) fully support the plea. The case of *Kearslake v. Morgan*, 5 T. R. 513,) is in all respects like it. The liability of the defendant admitted by the plea is that of endorser, which is a conditional responsibility.

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By the Court, SUTHERLAND, J. The plea is unquestionably good. It would have been good by way of accord and satisfaction, if no part of the original debt had been paid prior to the acceptance by the plaintiff of the last note. This was expressly decided in *Boyd & Suydam v. Hitchcock*, (20 Johns. R. 76.) It was there held that if a debtor gives his note endorsed by a third person *as further security* for a part of the debt, which is accepted by the creditor in full satisfaction, it is a valid discharge of the whole of the original debt; and it may be pleaded in bar as an accord and satisfaction. (6 Cranch, 253.) The additional security required by the creditor for a part of his debt, is a good consideration for the relinquishment of the residue. (*Le Page v. McCrea*, 1 Wend. 172. *Kearslake v. Morgan*, 5 T. R. 513.) This doctrine is admitted in *Hughes v. Wheeler*, (8 Cowen, 79,) and the distinction is there adverted to between the note of a *third person* and that of the debtor himself given for the original debt. The latter, it is there held, cannot be pleaded in bar of the original cause of action; but the plaintiff will not be permitted to recover on the original consideration, unless he produces the note upon the trial, or satisfactorily accounts for it. The authorities upon this point are all referred to in that case.

If the acceptance by the creditor of the note of a third person *for a part of the original debt* is a discharge of the whole, it must necessarily operate as an extinguishment of the original consideration, where such note is given for the *whole amount due*, and is accepted in full satisfaction of it. Although the defendant still remains liable, the character of his responsibility is changed. He has entered into a new contract with his creditor, who, upon an adequate consideration, (the obtaining the note of a third person as an additional security for his debt,) has agreed to look to the defendant as endorser only, and to relinquish all claim upon him in any other character. He cannot be charged upon the original consideration.

Judgment for defendant upon the demurrer, with leave to plaintiff to reply on payment of costs.

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Raymond.

FRANKLIN BANK vs. E. & H. RAYMOND.

THIS was an action of assumpsit, tried at the New-York circuit, in June, 1828, before the Hon. OGDEN EDWARDS, one of the circuit judges.

The declaration was on a promissory note for \$497,30, dated the 12th May, 1824, made by J. H. Cunningham, payable in 90 days to E. W. A. Bailey, and endorsed by him and by the defendants, who were sued as second endosers. The defendants pleaded the general issue, and gave notice of set off.

The question in this case arose on the defence set up. The defendants proved that the note in question was received from Bailey in *exchange* for a note of the same sum and date made by the defendants to Bailey. That on the 14th June, the defendants obtained the note received of Bailey to be discounted at the Franklin Bank to their credit. Subsequently notice was received at their counting room, from the Franklin Bank, that the note given by them to Bailey was payable on the 13th August; on which day an agent of the defendants, who had charge of their business, (they being absent from the city,) sent a lad to the bank with a check to pay the note. The lad returned with the note marked *paid*. The agent, discovering that it was not endorsed by Bailey, within one or two hours afterwards took it to the bank, offered it to a teller, and requested him to return the check. He was told that the note belonged to the *Hoboken Bank*; that it had been left by them for collection; that the amount had been carried to their credit; and that the payment could not be rescinded. The witness stated to the officer of the bank, that he could not recognize the application of the check to the unendorsed note; that the defendants had unsettled accounts with Bailey; were under responsibilities for him independent of that note; and that Bailey had died insolvent. The conduct of the agent in thus repudiating the application of the check to the payment of the note given by

A set off of money paid on a note, will not be allowed in a subsequent action, (on the principle of recovering back money paid by mistake) where the party paying, being the maker of the note, was ignorant at the time of payment, of the fact that the note had not been endorsed by the payee to the holder; it appearing conclusively that, although not endorsed, the note was transferred to the holder before maturity for a valuable consideration, and that the omission to endorse happened by inadvertence.

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the defendants to Bailey, was on the same day communicated to and approved by one of the defendants. The note taken up was not produced on the trial, but its non-production was accounted for to the satisfaction of the judge. The defendants proved that the check drawn by the agent was in the names of the defendants, on funds belonging to them in the Franklin Bank, and that the same was charged to them. They further proved that Bailey was indebted to them on a promissory note, in the sum of \$250, bearing date the 17th June, 1824, payable in ninety days; and in the sum of \$28 27, being a book account of the date of the 1st May, 1824; and that he died insolvent before the maturity of the note lent him.

On the part of the plaintiffs, it was proved that the note taken up by the defendants was discounted before due, at the *Hoboken Bank*, for the accommodation of Bailey, who received the avails; that the note was delivered to the bank, but through inadvertence it was *not* endorsed by Bailey. Sometime after the note was discounted, the cashier of the Hoboken Bank discovered that it was not endorsed, and sent to procure Bailey's endorsement; but he was either too ill to do it, or dead, at the time it was so sent. The note was deposited in the Franklin Bank for collection, and that bank, upon its being paid, credited the Hoboken Bank with the amount.

The judge charged the jury, that if they found that the note taken up at the Franklin Bank with the check of the defendants was made for the accommodation of Bailey, and given in exchange for the note declared on in this case, and that the defendant's knew that Bailey's intent was to put the same into circulation, the defendants had sufficient notice to put them upon the inquiry, whether Bailey had not passed away their note; and that a *delivery* of the note by Bailey to the Hoboken Bank, and his receiving the amount upon discount from that bank, vested in that bank the right to the money paid into the Franklin Bank. The counsel for the defendants excepted to the charge. The jury found a verdict for the defendants. A motion was now made, on the part of the plaintiffs, to set the same aside.

R. Bogardus, for plaintiffs. By the delivery of the note to the Hoboken Bank on their discounting the same, the note became the property of that bank, who had a right to receive payment and cancel the note. An assignment of a chose in action need not be in writing; delivery for a proper consideration is sufficient. (12 Johns. R. 346. 17 id. 284. 19 id. 95, 342.) Courts of law will take notice of and protect the rights of assignees of choses in action. (1 Johns. C. 51, 221. 3 Johns. R. 425. 4 id. 403. 12 id. 343.) The defendants here had such knowledge of the facts and circumstances as imposed upon them the duty of inquiry whether the note given by them had or had not been negotiated.

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G. Griffin, for defendants. The note drawn in favor of Bailey not having been endorsed by him, the defendants had the same defence against the holders of the note, which they would have had against Bailey, had it remained in his hands. As against him, the note declared on in this case would have been a set off; the defendants, besides, had other set offs. The Hoboken Bank could claim nothing under the law-merchant. (1 H. Black. 605.)

The note having been paid by *mistake* in matter of fact the defendants had a right to revoke the application of the check, and to direct the funds to the payment of the note declared on. (7 Wheaton, 14. Douglass, 637.)

By the Court, MARCY, J. The note given by the defendants to Bailey had not been transferred by him according to the custom of merchants. The holders of it could not therefore maintain an action upon it in their name; but Bailey had assigned it without endorsement, for a valuable consideration, to the Hoboken Bank. He had therefore parted with all his property in it, and the bank had acquired what interest he possessed in it. The holders stood in the relation of assignees of a *chose in action*, and not endorsees, and held the note subject to the equities existing between the original parties. (13 Mass. R. 305.) While thus situated, the defendants, under the belief that Bailey had negotiated the note, paid it to the assignees, or, which is the same thing, to

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their agents, the plaintiffs in this suit. After payment, the note was delivered to them, and they then discovered that it had not been negotiated, and that consequently, in the hands of the holders, it was subject at the time of the payment to a set off to the full amount of it. They did what they could to recall the payment. They offered to restore the note, and gave immediate notice to the plaintiffs that they should not recognize the application of the money to it. If the payment was recalled, or never took effect, the amount paid was a demand that ought to be set off in this action.

It is said the defendants had a right to apply the payment to the demand for which this suit is brought. A person paying money has undoubtedly a right to apply it as he pleases; but if he does not give express direction, or the circumstances are not such as to imply a direction, the person receiving it may make the application. In this case, however, the money was applied. It was sent to the bank expressly to take up the note given by the defendants to Bailey, and for that purpose it was received. No question can properly arise as to the right of making the application by either the payees or the receivers.

The money was paid by the defendants in ignorance of their rights. Does this circumstance, connected with the acts of the defendants to rescind or disaffirm the payment when they found the note had not been negotiated, actually rescind the payment, and leave the money in the hands of the plaintiffs to be set off in this action? or, to state the question in other words, perhaps more clearly, could the defendants, after disaffirming the payment, have maintained an action against the plaintiffs for the money thus paid? The general principle of law is indisputable, that if a party pays money under a mistake of the real facts, without any negligence imputable to him for not knowing them, he may recover back such money. What sort of facts are meant? Such facts, I apprehend, as shew that the demand on which the money was paid did not actually exist against the person paying at the time the money was paid. The cases collected by Comyn, (2 Comyn on Contr. 35, 41,) and those referred to by Saunders, in his Treatise on Pleadings and Evidence,

675, are of this character. The case which, in my opinion, goes the farthest towards sustaining the position contended for by the defendants, is that of *Milnes v. Duncan*, (6 Barnw. & Cress. 671.) A bill of exchange was drawn in Ireland, on a stamp less in amount than is required for such a bill drawn in England; but there was nothing on the face of the bill to shew where it was drawn. The acceptor became a bankrupt, and the holder applied to the endorser from whom he received it, to pay; but he refused, on the ground that the holder had not given notice, and had made it his own by his *laches*. The holder then threatened to sue for the amount he had paid the endorser for the bill, on the ground that he had passed to him a void bill, by reason of its not having the stamp required for a bill of that description. Believing that such was the fact, the endorser paid the bill, but he soon discovered that it had been drawn in Ireland, and that the stamp was sufficient, and brought his action for the sum he had paid, and recovered it. In that case it was clear that the plaintiff was wholly discharged from all liability as endorser on the bill, by the neglect of the defendant to give him notice; and that the money was paid after his liability had in fact ceased, but while he supposed it to exist, in consequence of his ignorance of the place where the bill was drawn.

The case before us is not only different, but so essentially different as to exclude, in my opinion, the application of the principle which permits money paid in ignorance of facts to be recovered back. The debt paid by the defendants was one that subsisted against them at the time of payment. The fact of which they were ignorant, did not shew that there was no debt existing at the time; it only shewed that they were in a situation which enabled them to set-off against the demand they had paid, a demand due to them from Bailey. I do not find any case where money paid on a substituting demand has been recovered back on the ground that the person making the payment has subsequently discovered facts that shew he had a set-off against the demand. It may be thought that this note having been transferred without endorsement, was open to be impeached in the same manner as if it had remained in the hands of Bailey; and as the note

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which Bailey gave for it had not been paid, it was void for want of consideration; and therefore there was not in fact a subsisting debt against the defendants at the time the money was paid. The facts do not warrant this position. Cunningham's note, endorsed by Bailey, was a good consideration for the note executed by the defendants. One promise is a sufficient consideration for another. According to the principles laid down by Lord Mansfield, in *Price v. Neal*, (3 Burr. 1354,) money paid by mistake or ignorance of facts, can never be recovered unless it be against conscience for the defendant to retain it. The operation of this principle destroys the defence in this case; for it will scarcely be contended that it is against conscience for the Hoboken Bank to retain the money. The defendants gave the note to Bailey, not doubting that he would negotiate it; and on the reasonable supposition that he had done so, they paid it. The Hoboken Bank paid the amount of the note when it was transferred to them by Bailey, intending it should be, and believing it had been duly negotiated to them. By mistake it was not, and by ignorance of this mistake the note was paid. It was by a mere accident that the defendants were in a situation to avail themselves of their set-off at the time the note became due; and it was because ignorant of this accident that they failed to avail themselves of this advantage. To retain the money paid under these circumstances cannot be against conscience. I am therefore of opinion that the check was in fact applied, and was properly applicable to the note given by the defendants to Bailey, and left at the Franklin Bank for collection, and is not money in the possession of the bank for the defendant's use, to be set-off against the demand for which this action is brought. There must be therefore, a new trial.

New trial granted.

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VAN HOESSEN VS. VAN ALSTYNE.

Van Hoesen
v.
Van Alstyne.

ERROR from the Columbia common pleas. Van Alstyne A demurrer
sued Van Hoesen in a justice's court, and declared for a horse posed to plead-
sold and delivered, and also for the amount of a note of \$25, ings in justice's
made by Samuel Cooley, junior, to the defendant, dated the courts, in
10th December, 1819, endorsed by the defendant, for a val- pleadings must
uable consideration to the plaintiff; the note having been duly be tested by
presented for payment to the maker, and notice of non-pay- the same rules
ment given to the defendant. The defendant pleaded the ge- which govern
neral issue, and also to the first count of the declaration, that a court of com-
at the time of the sale and delivery of the horse, the defend- mon pleas to
ant made and delivered to the plaintiff a promissory note for refuse to de-
\$55, the price of the horse, and afterwards, on the 1st of cide questions
November, 1822, paid to the plaintiff, \$25, part thereof, and of law perti-
for the residue delivered to him Cooley's note endorsed by nent to a case
him, which the plaintiff received and give up the defendant's on trial, upon
note. That the plaintiff did not subsequently present Cooley's which a decision
note. That the plaintiff did not subsequently present Cooley's is asked by
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note. That the plaintiff did not subsequently present Cooley's transferred,
note. That the plaintiff did not subsequently present Cooley's and notice of
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note. That the plaintiff did not subsequently present Cooley's contemplated.
note. That the plaintiff did not subsequently present Cooley's The sufficien-
note. That the plaintiff did not subsequently present Cooley's cy of notice of

non-payment to an endorser, when the facts are conceded, is a question of law to be decided by the court, and not to be submitted to a jury.

UTICA, the justice, who gave judgment for the plaintiff for
August, 1829. \$32.54.

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v.
Van Alstyne.

The defendant appealed to the Columbia common pleas, who also gave judgment for the plaintiff on the demurrer. On the trial of the other issue the following facts appeared : That the plaintiff, in November, 1822, sold a horse to the defendant for the price of \$50, for which the defendant gave him his note ; that sometime after the sale of the horse, the particular time not being proved, the defendant paid the plaintiff \$25, and endorsed to him a note made by Samuel Cooley, junior, for the sum of \$25, bearing date in December, 1819, and took up his own note ; that three or four weeks after the transfer of the note, the plaintiff demanded payment of Cooley, who denied his indebtedness, and in the last of the winter of 1823, the plaintiff gave notice of non-payment to the defendant. The plaintiff then offered to prove that the defendant, at the time of the transfer of the note, fraudulently represented Cooley to be solvent, or fraudulently concealed his insolvency. To the admission of this evidence the defendant objected, but the court received it. The plaintiff then proved, that at the time of the transfer, the defendant represented Cooley to be good ; that in answer to an observation of the plaintiff, that he did not know any thing about his circumstances, and if Cooley did not pay, the defendant must, the defendant answered that Cooley would get into business again and would pay the note. It was proved that on the 15th March, 1822, Cooley obtained a discharge of his person as an insolvent debtor ; that in 1822 he resided in Hudson, and was not worth a shilling ; and that the defendant also resided in Hudson. The plaintiff resided seven miles from Hudson. Cooley was his nephew.

The counsel for the defendant called upon the court to determine, 1. Whether the plaintiff had a right to shew fraud in the transfer of the note ; 2. Whether a demand of payment of Cooley and notice of non-payment was necessary to entitle the plaintiff to recover ; 3. And if so, whether a demand was duly made, and notice given in time to charge the defendant. The court said they would respond to these questions in their charge to the jury ; in which they submit-

ted to the jury the question of fraud, telling them that if they believed fraud to have been established, it would be for them to determine whether a demand of payment of Cooley's note and notice of non-payment were necessary to have been shewn; and if necessary, then to determine whether the demand and notice set up were sufficient. The counsel for the defendant excepted to the charge. The jury found a verdict for the plaintiff, on which judgment was entered. The defendant sued out a writ of error.

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v.
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H. P. Hunt, for plaintiff in error. The causes of demurrer assigned are fully supported by the authorities. (1 Chitty's Pl. 617, 618, 625. 3 Johns. R. 315.) A demurrer may be interposed in a justice's court. (14 Johns. R. 369. 2 Cowen, 437.)

The second plea, being equivalent to the general issue, was objectionable, but the objection could be urged only by special demurrer. (1 Chitty, 497.)

Cooley's note being over-due when transferred, must be considered as payable on demand. The plaintiff was bound to make demand and give notice within a reasonable time. He permitted three or four months to elapse. (2 Caines, 343. 9 Johns. R. 121. 1 Cowen, 407. 7 id. 705.) The known insolvency of the maker is no excuse for not making demand and giving notice. Whatever discrepancy exists on this subject in the English cases, there is none in the cases decided in our courts. (4 Cranch, 161. 2 Heywood, 45. 2 Conn. R. 126. 3 Johns. C. 5.) The necessity and sufficiency of notice was a question of law, and ought not to have been submitted to the jury. Nor ought the question of fraud to have been submitted to them; it was not in issue and not inquirable into in the action of assumpsit. (7 Cowen, 708. 1 Johns. R. 502.)

A. Vanderpoel, for defendant in error. Most of the special causes of demurrer relate to form, and are cured by the general provision of the statute, requiring pleading in justices' courts to be liberally construed, without regard to established forms or technical rules, and with a view to substantial justice between the parties. (Statutes, vol. 6, p. 296 c.) The

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objection to the replication for duplicity is strictly technical. The plea, however, is bad, in not averring that the note of Cooley was accepted in satisfaction of the original debt; and the defendant committing the first error, the plaintiff was entitled to judgment.

The demand and notice were sufficient. There is no precise time in which a demand must be made in a case like this. Each case must be regulated by its peculiar circumstances. (1 Cowen, 408.) The insolvency of the maker of the note, accounts for the delay; and that insolvency existing at the time of the endorsement, notice of non-payment was not necessary. It is only where the insolvency happens subsequent to the transfer, that the party is not excused from giving notice. (2 H. Black. 336, 609. 4 Cranch, 164. 9 Mass. R. 208. 11 Johns. R. 182.) A verdict will not be set aside because a question of law was submitted to a jury. if the jury decided correctly.

By the Court, SAVAGE, Ch. J. Justice seems to have been done in this case, and it is to be regretted that it was not done *secundem artem*. The thirty eighth section of the act of 1824 directs the common pleas, upon appeal, to render judgment as the very right of the case shall appear, without regard to the previous trial had thereon; and they are required to construe the pleadings with a view to substantial justice between the parties: but that has been adjudged to mean justice according to law. It is true, that the pleadings in justices' courts are viewed with great liberality; but the parties before the justice may object to the pleadings, and then the rules applicable in other courts must govern. The replication here is bad for duplicity. A replication may traverse as many facts in the plea as constitute one point; but here the plaintiff tenders an issue to the country upon one distinct fact, and then avers certain other facts in answer to another part of the plea, and concludes with a verification. It is said the plea is bad; but if so, it is bad only in form not in substance. I am therefore of opinion that the justice and the common pleas both erred in overruling the demurrer.

The common pleas also erred in not deciding the questions raised on the trial; as they were pertinent. They erred, al-

so, in directing the jury to pass upon the sufficiency of the notice. That is a question of law were the facts are conceded and should have been decided by the court. (*Sice v. Cunningham*, 1 Cowen, 408.) The note having been transferred long after it was due, is to be considered as a note payable on demand; and the demand and notice must be made in a reasonable time. What is a reasonable time, depends on the circumstances of the case. From the remark of the defendant below, that Cooley would get into business again and pay, it is evident an immediate demand and notice was not contemplated. The demand was in fact made within a few weeks, and notice given within two or three months. I am inclined to think this was sufficient, under the circumstances of the case, to charge the endorser. The result is right, but the means by which that result was obtained were erroneous. The judgment, therefore, must be reversed, and a venire de novo awarded to Columbia common pleas.

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Lewis
v.
Lozee.

LEWIS vs. LOZEE.

✓ **ERROR** from the Dutchess common pleas. Lozee sued Lewis in an action on the *case* for making a *distress* of his goods, as his landlord, claiming a greater sum to be due to him than was in fact due, to wit the sum of \$265 instead of \$175; and that the plaintiff, to regain possession of his property, was forced and obliged to pay, and did pay, the pretended arrears of rent, together with the costs of the distress, &c. The defendant pleaded *non cul*.

On the trial of the cause, it appeared that Lozee was the tenant of Lewis of certain premises, under an indenture of lease, reserving an annual rent of \$350, payable by half yearly payments, *in advance*, commencing on the 1st of March

In an action on the case by a tenant against his landlord, for distraining for a greater sum than is due for rent, where the tenant, to regain possession of his goods, gives a negotiable note, with sureties, for the sum claimed, if entitled to recover at all, the tenant

is not entitled to recover, as *damages*, the difference between the rent due and the sum distrained for, if the note is not actually paid, and remains in the hands of the landlord.

A negotiable note, with sureties, taken by a landlord from his tenant, after a distress, for the amount claimed as rent, payable in 60 days, under an agreement to relinquish the distress, and not to re-enter or distrain within 60 days, is a *collateral security* only, and not a payment or satisfaction of the rent; it appearing affirmatively that the note has not been paid or negotiated by the landlord.

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1827. The plaintiff produced a receipt for \$175, in full of rent to the *first* day of March, 1828. On the *fourth* day of March, 1828, Lewis, by his bailiff, distrained upon certain property of the plaintiff, claiming the sum of \$265, as rent due to him on the first day of March then instant. The property distrained was not removed from the premises. On the *fifth* day of March, 1828, the plaintiff, with two sureties, gave a note to the attorney of Lewis, and took a receipt in these words: "March the 5th, 1828. Recd. from Russell Lozee his note, with L. L. P. and J. P. R. as security, for \$273, payable to Morgan Lewis or bearer, in full of rent due the said Morgan Lewis on the first of March instant, and costs of distress; said note payable on or before the 4th of May next: in consideration whereof, I agree, in behalf of the said Morgan Lewis, to relinquish the distress made; and further, that the said Morgan shall not re-enter or distrain within sixty days from this date. (Signed) John Armstrong, Jr. atty. for Mo gan Lewis." On the part of the defendant, the attorney of Lewis testified, that the note referred to in the receipt had not been paid: that it was the property of the defendant, and then the subject of a suit pending between the parties; that when the note was given to him, the plaintiff did not intimate that the rent claimed (for which, and the costs of the distress, the note was given,) exceeded the rent due; that such intimation was not given to him until the *twelfth* day of March, when the witness told the defendant if he would furnish him with the evidence thereof, he would credit him the excess on the note. It appeared that at the time of the distress, the plaintiff informed the *bailiff* that he had a receipt for a part of the rent claimed to be due; but there was no evidence that the bailiff communicated such claim to the defendant or his attorney. The court charged the jury that the receipt of March 5, 1828, standing unexplained, and in the absence of other testimony, was evidence that the note was accepted in satisfaction and payment; and they directed the jury to find a verdict of ninety dollars, with interest from the last day of grace of the note, that sum being the difference between the amount of rent distrained for and the amount of rent actually due at the time of the distress.

The defendant excepted to the charge. The jury found for the plaintiff \$92, 62, for which a judgment was entered. The defendant sued out a writ of error.

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J. Armstrong, jun. for plaintiff in error. There was no agreement to accept the note in payment. It was not paid nor negotiated; consequently it was no payment of the pre-existing debt or liability of the tenant (2 John. C. 438. 3 id. 71. 5 id. 68. 7 id. 311. 9 id. 310. 1 Wendell, 424.) In the case in 5 Johnson, it was held that a receipt for a negotiable note, though *in terms* for so much cash, in full of rent, was not evidence of an agreement to take the note as payment; and here such agreement is rebutted by the right to distrain or re-enter, asserted on the part of the landlord, and agreed to be suspended until the note fell due.

The plaintiff below was not entitled to recover. At all events, the rule of damages adopted by the jury, under the instruction of the court, was erroneous. The plaintiff paid nothing. No actual damages were sustained. The property distrained was not removed from the premises; and though, in law, that property ceased to be under his control whilst the distress continued in force, he had no right to complain thereof; for it is admitted that the distress was rightful as to \$175 of the sum claimed. There is no evidence of malice; it was a mistake, offered to be corrected as soon as discovered; and if such offer cannot be considered, under the circumstances of this case, as a tender of amends within the statute, (1 R. L, 436,) still it shews the temper of the parties, and that no pretence existed for exemplary damages. The direction to the jury to find a specific sum in damages is alone sufficient to reverse the judgment.

H. Swift, for defendant in error. The distress was made for \$90 more than was due to the landlord. This sum was paid; for the giving of a negotiable note was equivalent to the payment of money. The tenant was not obliged to wait until the note fell due, thereby giving to the landlord an opportunity to negotiate it, and to depart beyond the reach of process, but might institute his suit immediately. (11 Johns. R. 464. 6 Cowen, 297. 7 id. 662.) The receipt is *prima facie*

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evidence of an agreement to accept the note in satisfaction of the rent. The agreement not to re-enter or distrain within 60 days, at the foot of the receipt, could not have been made in reference to the note, because the 60 days expired on the *fifth* day of May, whereas the note did not fall due until the *seventh* day of May.

By the Court, SUTHERLAND, J. The receipt given by Armstrong for the note of Lozee and his sureties, shews that the note was received *as collateral security only*, and not as payment of the rent; for the receipt contained an express stipulation that Lewis should not re-enter or distrain for the rent for sixty days from the date, that being the period which the note had to run. If the note was received by Lewis, *as payment or satisfaction of the rent*, why the stipulation that he should not re-enter or distrain again for 60 days? If the rent was paid by the note, he could not re-enter: his only remedy was upon the note, and his peculiar remedies as landlord were gone. The receipt appears to me to carry, as conclusive evidence upon the face, of it, that the note was received as collateral security only, and not as payment, as though it had been so expressed in terms.

There are cases, undoubtedly, where the giving negotiable paper is equivalent to the payment of money. (2 Esp. R. 571. 8 Johns. R. 206. 11 id. 518, 464. 6 Cowen, 301, 470. 7 id. 668. 1 Wendell, 430.) But none of those cases have any analogy to this. Here it is manifest it was not understood to be a satisfaction of the rent by the parties, but only a postponement of the day of payment, upon receiving additional security. It appeared affirmatively that the note had not been paid, and was still in the hands of the payee. (2 Johns. C. 438. 3 Johns. R. 71. 5 id. 68. 7 id. 311. 9 id. 310.) The plaintiff, therefore, if entitled to recover at all, should have had nominal damages only; and the court erred in instructing the jury to find for the plaintiff the difference between the rent actually due and the amount distrained for, the latter being that for which the note was given.

Judgment reversed, and venire de novo to Dutchess common pleas.

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S. & I JAQUES vs. TODD.

THIS was an action of assumpsit, tried at the New-York circuit, in October, 1827, before the Hon. REUBEN HYDE WALWORTH, then one of the circuit judges.

The declaration contained the common counts for goods sold and delivered, and the money counts. The defendant pleaded the general issue, and gave notice of set-off.

A witness for the plaintiff testified, that in August, 1825, he was employed as a measurer on board of Ship Rebecca, lying at Brooklyn, the cargo of which was salt, owned by the plaintiffs. That he delivered to the sloop "Ambassabor," lying along side of the ship, 1500 bushels of Turk's Island salt, for which the person acting as master signed a receipt, on the back of the order. The order was produced, and is in these words: "Ship Rebecca at Brooklyn. The measurer will please deliver Mr. E. M. Todd, pr. bearer, fifteen hundred bushels Turk's Is. salt, and oblige (signed) S. & I. Jaques. 13th August, 1825. 1500 Bus. Sloop Ambassador." The receipt endorsed, "Rec'd the contents of the within order," signed "Daniel McGuire." It was proved that the sloop "Ambassador" was owned by the defendant; that McGuire, who is since deceased, was her master; that the cargo of the sloop was received by the defendant at Waterford, where he then resided; and that the price of the salt was fifty-two cents per bushel. The plaintiffs rested.

On the part of the defendant, James Bailey was sworn as a witness, who testified, that he, as a member of the house of Bailey and Voorhees, in August, 1825, bought of the plaintiffs the salt in question. That the house of Bailey and Voorhees had orders from the defendant to buy 1000 bushels of salt for him, and that on the suggestion of McGuire, the captain of the defendant's sloop, he increased the quantity to

Where the course of business between a merchant in the country and a merchant in town is such, that the country merchant transmits to his correspondent in town his produce and such other articles as he has to sell, and the merchant in town, in return, supplies him with such articles of merchandise as he deals in, and fills up his orders by procuring from other merchants on credit such articles as he does not deal in, and charges them to the merchants in the country, the latter is not liable to the seller for any articles thus procured, although he directs the purchase of an article which he knows the merchant in town does not deal in, and the seller is informed for whom the purchase is made

if the merchant in the country has funds in the hands of the merchant in the city, and has never authorized him to pledge his credit on the purchase of any articles thus ordered, or recognized such act. The agency in such case is special, without authority to pledge the credit of the principal.

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1500 bushels. At the time of the purchase he told the plaintiffs he was going to send the salt to the defendant, and wished it to be delivered on board the defendant's sloop, of which McGuire was captain; that the defendant was known to the plaintiffs as a man of high responsibility; that he bought the salt for the defendant on a credit of four months; that he bought it on his own responsibility; that he did not use the credit of the defendant, and had no authority to purchase on his credit; that he never purchased for the defendant on the credit of the defendant, and that in no instance had he ever been authorized by the defendant to pledge or use defendant's credit; that he almost always had funds of the defendant in his hands, as he was in the habit of receiving and selling his produce, and at the time of the purchase in question was indebted to the defendant \$1500, the avails of articles remitted to his house to be sold; that the defendant usually dealt with his house, who sold him such articles as he needed and they had, and such as they had not and he ordered, they went out and purchased for him on their own responsibility, and charged to him; that when the defendant ordered the salt, he knew that Bailey and Voorhees did not keep it for sale; frequently when the defendant sent them cash to purchase articles which they had not themselves, they purchased the articles on their own responsibility on credit, and charged them to him at cash prices, and had the benefit of the credit themselves; that they were known as the general agents of the defendant in New-York; that at the time of the purchase of the salt in question of the plaintiffs, nothing was said as to its being on the account and credit of Bailey and Voorhees or on the defendant's account and credit, but it was his understanding that the purchase was for the notes of Bailey and Voorhees, in the same manner as previous purchases had been made: that the house of Bailey and Voorhees had often bought salt for the plaintiffs from the defendant, and had given their own notes therefor; that they always purchased on their own responsibility; that the bills of parcels would sometimes not be sent in, until by the lapse of the term of credit the paper to be given would be bankable when the paper would be sent for and they would give their

notes ; that sometimes the plaintiffs would wait until the credit had entirely expired, when on sending in the bills they would receive the money or a check ; that the defendant was in the habit of buying salt himself of the plaintiffs, and on making such purchases, would draw in favor of the plaintiffs on Bailey and Voorhees, who accepted his drafts ; that the house of Bailey and Voorhees failed on the 17th October, 1825 ; that their credit was good up to the time of their failure, but they were much pressed for money ; that the defendant knew the salt in question came from the plaintiffs ; that it had never been charged by Bailey and Voorhees to him, because no bill of parcels had been rendered to witness, he never making but one entry of those transactions, and always waiting till the bills came in before he debited the defendant ; that no bill of this salt ever was rendered by the plaintiffs, to his house, it having stopped payment as above stated. Salt is usually purchased on a credit of four months.

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This witness further testified, that at the same time he purchased the salt in question, a quantity was bought by him of the plaintiffs, for John Stewart, which was parcel of the same purchase ; that he bought it at the request of Stewart, the house of Bailey and Voorhees being indebted to him ; and that Stewart afterwards gave his note to the plaintiffs for his part of the purchase.

Another witness for the defendant testified, that in August, 1825, he proposed to buy salt of the plaintiffs, who said he might have it on the same terms they had sold a lot to Bailey and Voorhees ; that on the day of the failure of Bailey and Voorhees he met one of the plaintiffs and they spoke of the failure. Witness asked him if he would loose any thing by them, to which he replied he was afraid he should ; that they had purchased two parcels of salt of him to go up the river, one for Todd and one for another man, but he should try to saddle it on Todd ; to which witness answered, he would have hard work to do that, as Todd was a hard one.

The plaintiffs proved, that in August, 1825, they had no clerk in their employ. Their books of account were then

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produced and identified, i. e. a blotter and a ship book, the blotter containing entries made on the day of the sale of articles sold, and the ship-book containing entries also made at the time the transactions took place, used as a check to shew the cargoes sold. These books were identified by a witness who had been a clerk of the plaintiffs, and left their employ in July, 1825, and testified, that before he left the plaintiffs they expressed their doubts of Bailey and Voorhees' credit; that Bailey and Voorhees applied very often to borrow money of the plaintiffs, who declared themselves uneasy about them, and that they were unwilling to lend, and yet unwilling to refuse. The general credit of the plaintiffs' books for correctness was shewn. The following entries were then read from the blotter :

Delivered 23d. Note rec'd 20 Oct.	Entered.	John Stewart, - - - - 4 mos. 500 Bus. Turks I. Salt (Rebecca) a 52 c. for his draft 4 mos on Bailey & Voorhees Sloop Volunteer, - Capt. Rynders	260
Delivered 15th.	Entered.	Eli M. Todd, 4 mos. for draft on B. & V. 1500 Bus. Turks I. Salt (Rebecca) a 52 c. Sloop Ambassador, - - McGuire.	780

And from the *ship-book* :

No. bushels Turks Is'd salt out ship Rebecca, bo't of O. Mauran.

Aug. 15. Sloop Ambassador, Capt McGuire, for Eli M. Todd,	1500
18. Sloop Belona, &c.	200
22. Scow Washington, &c.	500
23. Sloop Champlain, &c.	1000
" Sloop Volunteer, Capt. Rynders, for John Stewart,	500

John Stewart testified, that he directed the purchase of salt in August, 1825; that his brother left orders with Bailey and Voorhees to make the purchase; that the salt came up by Capt. Rynders, who brought a bill from plaintiffs, to-

gether with a note for the amount for him to sign, which he signed and sent to plaintiffs. A clerk of the defendant in August, 1825, was called by the plaintiffs, who testified that the defendant usually received bills of parcels of goods sent to him, but he had no recollection of ever seeing or hearing of any bill for the salt in question. Two letters from the plaintiffs to the defendant, calling on him for a note for the 1500 bushels of salt, were read in evidence, bearing date the 3d November, and the 1st December, 1825, and an answer of the defendant of the date of 6th January, 1826, acknowledging the receipt of those letters, and saying that in 10 or 12 days he would be in New-York and would do himself the honor of waiting upon the plaintiffs.

The judge charged the jury, that to entitle the plaintiffs to recover, they must shew, either that the house of Bailey and Voorhees were the general agents of the defendant to make purchases on his credit, or that he had authorized them to make this particular purchase on his credit, or that he had subsequently ratified their act; that if the jury were satisfied from the testimony that both parties understood at the time of the purchase that the salt was bought on the sole credit of Bailey and Voorhees the question of agency would not arise; that having funds in their hands to more than the amount of their purchase on the order of the defendant, and the salt coming to his use, would not make him liable; that the testimony of Bailey negatived the conclusion that the defendant ever authorized Bailey and Voorhees to pledge his credit for the purchase, or that he had ever given them a general authority for that purpose, or that he had subsequently sanctioned the act, and if the jury believed his testimony, which was unimpeached, the purchase was on account of Bailey and Voorhees, and not of the defendant; that it was a common practice for merchants in the city to fill up the orders of their customers, and if the customer never authorized or intended his credit to be pledged to a third person, it would be unreasonable to make the customer responsible to every person of whom the merchant had purchased, especially when, as in this case, the customer had sufficient funds

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in the hands of the merchant; but if he was in the habit of permitting the merchant to purchase on his credit, he would be liable, whatever might be the situation of their accounts, or whatever might be his intention in the particular instance; that the books of the plaintiffs had been admitted in evidence, but were not to be considered as legal evidence of the sale of the salt to the defendant. Books of account were sometimes evidence of a sale and delivery of goods, but they were evidence only in the absence of witnesses to the facts to which they related. In the present case, the jury had the evidence of Mr. Bailey, the person acting at the time; all the books proved was, the understanding of the plaintiffs, which could not charge the defendant, if Bailey and Voorhees were not authorized to purchase on his credit.

The counsel of the plaintiffs excepted to this charge, and requested the judge to charge the jury, that under the circumstances of this case, Bailey and Voorhees were authorized, as agents of the defendant, to make the purchase in question: and that unless there was an express agreement to look to Bailey and Voorhees, exclusive of the responsibility of the defendant, the latter was liable; which the judge refused to do. The plaintiffs' counsel again, excepted. The jury found a verdict for the defendant, which was now moved to be set aside.

D. Lord, jun. for plaintiffs. Bailey and Voorhees could not have claimed the purchase of the salt on their own account. They could not have charged the defendant a profit. They would not have been liable for the loss of the article; the property had vested in the defendant. An action could not have been maintained against them by the plaintiffs, the original entry being against the defendant; as between them and the defendant they were simply his agents. Whether Bailey and Voorhees were authorized or not to purchase on the defendant's credit is entirely immaterial, the fact being shewn that they acted on his behalf, and for his benefit. When an agency is established, the principal is liable, although it does not expressly appear that the credit of the principal was authorized to be pledged. The principal is charged be-

cause he has the selection of his agent, and therefore cannot complain when he abuses his trust. (1 Campb. N. P. 85. 109. 1 Ld. Raym. 224. 5 Esp. R. 76.) The fact that nothing was said at the time of the purchase to whom the credit was given, when it was admitted that the plaintiffs were told that the purchase was made for the defendant, establishes the liability of the defendant. Bailey says he understood the purchase to be for the notes of his firm. The books of the plaintiffs show that they understood the purchase to be on the defendant's liability; but the rights of the parties must be determined by the understanding of both parties, by the contract made between them, or the contract made by the law upon the facts disclosed. (1 Cowen, 359.)

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D. B. Tallmadge & S. Staples, for defendant. Bailey and Voorhees never acted as the agents of the defendant, notwithstanding the testimony of the witness (Bailey) that his house were known as his general agents in New-York. The meaning of the witness is to be gathered from the whole of his testimony, from which it is manifest that they were not such agents. Bailey and Voorhees had, in repeated instances, purchased salt of the plaintiffs for the defendant, and given their own notes. The case is not to be distinguished from that of a master sending out a servant with cash to make purchases, who, instead of paying out the money, obtains the property on the credit of his master; in which case it will not be pretended that the master would be liable. The power of an agent should not rest on intendment, but be conclusively shewn; as when a person is sought to be charged as a partner, the proof must be positive. It is conclusively shewn that Bailey and Voorhees were always in funds for the defendant, which is the governing principle. (Paley's Principal and Agent, 141. 5 Esp. R. 76.)

D. B. Ogden, in reply. An agent is one who is employed to do an act for another. Bailey and Voorhees were employed to make a purchase for the defendant; they therefore were his agents. They never charged the defendant with the salt. The allegation of the defendant that he had funds

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in the hands of his agents which they did not pay over, will not help him. There are two classes of cases on this subject; one where the agent acts in his own name, and the principal is not known at the time of the purchase; there the principal, when discovered, may be charged: the other, where the seller knows that the purchaser acts as agent. In such case the principal is liable of course, unless it be affirmatively shewn that the credit was given to the agent. Whether an agent has authority to purchase on credit, is a question of law and not of fact. The judge therefore ought not to have refused to instruct the jury on that point.

By the Court, MARCY, J. This case turns on the nature and extent of the authority of Bailey and Voorhees, as agents of the defendant. If they were his *general* agents; if they were *special* agents, and the act done by them was within the scope of their powers; if in any instance they had in fact pledged his credit, and he had recognized their right to do so; or if he had, subsequent to the purchase, in any way, however slight, indicated his assent to the pledge of his credit, in this particular case he is liable to the plaintiffs on the demand for which this action is brought.

The nature of this agency is to be gathered from the connection existing between the defendant and Bailey and Voorhees. It appears the defendant was in the practice of consigning to them whatever produce he had for the New-York market. They sold it and gave him credit therefor. He purchased of them the goods which he required for his store at Waterford. He often sent to them for articles which he knew they did not usually keep, and was aware that they had to purchase them to supply his order; but these purchases were uniformly made in the name and on the responsibility of Bailey and Voorhees. Although Mr. Bailey states his house were the general agents of the defendant in New-York, and were known to be such, this part of his testimony is to be taken in connection with what he had before said in relation to the agency. He had previously declared that the article in question was purchased on his own responsibility for the defendant; that he had never used, or had authority

to use the credit of the defendant, in any instance whatever. Do these facts make out a general or a special agency? The distinction between a general and special agent is not always obvious: indeed, to trace the line that separates them is sometimes a matter of great nicety; and I apprehend that the principal difficulty in this case relates to this distinction. "By a general agent is understood, not merely a person substituted in the place of another for transacting all manner of business, (since there are few instances, in common use, of an agency of that description,) but a person whom a man puts in his place to transact all his business of a particular kind; as to buy and sell certain kinds of wares, to negotiate certain contracts, and the like." (*Paley on Agency* ch. 3. sec. 5.) A person employed by another for a particular purpose, and acting under limited and circumscribed powers, is a special agent, and cannot bind his principal by any act exceeding the precise limits of his authority. (2 *Saunders on Pl. and Ev.* 732.) A factor, employed to sell goods, cannot pledge them. (*id.* 735.) A person, employed to sell articles at auction, at not less than a stated price, cannot, it is said, sell them at private sale, even for a price beyond that fixed for the sale at auction. (*Ambl.* 498.) A principal who agrees to accept, and authorizes his agent to draw bills for advances on merchandise purchased for and consigned to him by such agent, is not liable for bills drawn on him by the agent, on account of his own property consigned to the principal. (1 *Peters*, 264.) A distinction is to be taken also between a special agent and a general agent, with instructions private or unknown to the person dealing with him, limiting and controlling, in particular instances, the exercise of his general powers. If Bailey and Voorhees had been constituted the agents of the defendant, with the power to buy and sell for him, but were directed not to buy on credit when they had funds belonging to him, they would have been general agents; and if they had disregarded the instructions of their principal, and actually pledged his credit while they held his funds, he would have been bound by their acts, and it would have availed him nothing to shew that they had transgressed the limits prescribed to them. In such a case, the power to pur-

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chase on credit would have existed in the agents ; but its exercise would be controlled by instructions, and dependent on circumstances not presumed to be generally known. But if the defendant, in constituting them agents, had withheld from them, under all circumstances, the authority to buy on his responsibility, or even to buy at all for him unless they were furnished with funds for immediate payment, they would, in my opinion, be only special agents. The evidence of Bailey is explicit, that his house never had the power to purchase on credit for the defendant.

Their mode of doing business is one that is very common. The merchant in the country sends what articles and produce he has on hand to a merchant in New-York to sell, and transmits to him his orders for such goods as he may require. He is probably aware that there are articles on his order which the merchant to whom it is directed does not usually keep ; but he expects, as the correspondent has his funds, that he will make out the assortment by purchasing on his own account, and perhaps on credit, such articles as his own establishment cannot supply. No country merchant, under such circumstances, supposes that he is committing his fortune to his correspondent, by giving him an unlimited power to use his credit in purchasing goods. From the testimony in this case, taking it altogether, Bailey and Voorhees appear to me to have been special agents, without the power to pledge the credit of the defendant.

If a special character can be given to their agency, consistently with well established principles of law on this subject, it appears to me that it should be done. Prudence on the part of principals requires that they should often make restrictions limiting their responsibility ; and when made in good faith, they should be recognized and upheld with all necessary safe guards for their support, and cautionary regulations to preserve them from perversion or abuse.

If the fact was clearly made out, that the salt was purchased by Bailey and Voorhees on the credit of the defendant, restricted as the agency was, I should consider it an act beyond the scope of their authority, for which the defendant would not be liable. I arrive at this conclusion from a view



of the general character of the agency as detailed in Bailey's testimony.

It is proper to examine more minutely and critically the facts and circumstances relative to the sale of the salt, to see if there is any thing to vary the character of the transaction. The plaintiffs were informed that the salt was purchased for the defendant, and the defendant actually received it. Whether the credit was given to the defendant or to Bailey and Voorhees, is a matter left in some doubt. It would seem, from the entries in the books of the plaintiffs, that the credit was given to the defendant; another quantity sold at the same time, at the instance of Bailey and Voorhees, to Stewart, under somewhat similar circumstances, was charged to him, and not to B. and V. Bailey, however, says he gave no direction to have the salt in question charged to the defendant. He intended to buy it, and supposed he had bought it, on his own credit; he had often bought the same article of the plaintiffs for the defendant; and the previous purchases had always been on the responsibility of his house. From a conversation of the plaintiffs with one of the witnesses, after the failure of B. and V. it is quite evident they doubted the liability of the defendant. It is not so material to know to whom the plaintiffs charged the salt, as it is to ascertain to whom the facts warranted them to make the charge; for the rights of one party are not to be affected by the misapprehension of the other. If the facts relative to the sale are all before us, and there is no reason to suspect they are not, it would seem that in making the charge, on the supposition it was made against the defendant, the plaintiffs looked more to his ability to pay than to these facts. The circumstance that the salt was purchased with a design to be sent to the defendant, and that this was made known to the plaintiffs, does not, in my opinion change the features of this case. There is some ambiguity in the witness' expression that *he purchased the salt for the defendant*. He undoubtedly meant to be understood that he purchased it for the use of, or to be sent to the defendant, but not on his account; for he follow-

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ed this expression immediately by the declaration that he purchased it on his own responsibility.

But the defendant had the property, and it is therefore urged that he is liable to pay the plaintiffs for it. The answer to this is two fold. It appears, in the first place, that the plaintiffs did not sell the property to the defendant, but to Bailey and Voorhees: if, however, upon the question of fact, there was any doubt, the other answer is conclusive—Bailey and Voorhees had funds furnished by the defendant, and his order to them was to procure it with these funds. So they understood it, and nothing was then or had been previously done to authorise the plaintiffs to understand it otherwise. If the facts will at all warrant the position that the defendant sent his agents to the plaintiffs to buy the salt, it was with money to pay for it. He can therefore avail himself of the principle, that where money is given to the agent or servant to purchase goods for his principal or master, and he retains the money, and purchases on the credit of his employer, the latter is not liable, unless it can be shewn that sometimes the agent or servant has been permitted to buy on credit, (1 Show. 95. 5 Esp. N. P. Rep. 76. Peake's N. P. 74. Paley on Agency, 140.)

I see no reason to question the correctness of the judge's charge to the jury, or his refusal to charge as the plaintiffs requested. The motion for a new trial must therefore be denied.

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BAKKER VS. MECHANIC FIRE INSURANCE COMPANY OF THE CITY  
OF NEW-YORK.

An insurance  
Company may  
make a valid  
promissory  
note, which  
will be held  
good until the  
contrary be  
shewn.

A note, by  
which J. F. as  
president of an  
insurance com-

pany, promises to pay a sum certain, is *not* the note of the company, but of the maker alone.

DEMURRER to declaration. The first count of the declaration set forth that the Mechanic Fire Insurance Company of the city of New-York was a body corporate and politic in fact and in name: and being such body corporate and politic, and one John Franklin being the president of said company, and being thereunto duly authorised, and acting within the scope of the legitimate purposes of the company, on the 1st July, 1823, at, &c. made a certain promissory note, and

then and there delivered the same to the president and directors of the Life and Fire Insurance Company; by which said note the said John Franklin, as president as aforesaid, promised to pay to the order of the president and directors of the Life and Fire Insurance Company on demand the sum of \$3172,40, with interest, for value received. The count then proceeded to state that the said Life and Fire Insurance Company then and ever since being a body corporate and politic in fact and in name, by the name of the Life and Fire Insurance Company, and one Joseph Swift being the assistant president, and one Matthew L. Davis being the secretary of the said Life and Fire Insurance Company, and they the said Joseph Swift and Matthew L. Davis being thereunto duly authorised, and acting within the scope of the legitimate purposes of the said company, afterwards, &c. on the same day and year, and at, &c. aforesaid, endorsed the said note, and by that endorsement, ordered and appointed the contents thereof to be paid to the plaintiff, and delivered the note so endorsed to the plaintiff, of which the defendants had notice; by reason, &c. To this count, the defendants demurred, and the plaintiff joined in demurrer.

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*S. Cowdrey*, for defendants. The note is void. The defendants had no authority to issue negotiable paper. (2 Johns. R. 109. 15 id. 358.) The note declared on is not a note of the *defendants*, but of *John Franklin*, whereby *he*, as president of the company, promised to pay, &c. If an act be done by an agent for his principal, it must be averred to have been done for the principal, or the agent only is bound. (Com. Dig. Attorney c, 14. 2 Ld. Raym. 418. 6 Johns. R. 96. 9 id. 334. 11 Mass. R. 27. 12 id. 173. 5 id. 299. 6 id. 58. 7 Cowen, 454.)

The note was not endorsed by the *payees*. It is stated to have been made payable to "the president and directors of the Life and Fire Insurance Company," and the endorsement is by the agents of "the Life and Fire Insurance Company," averred to be a body corporate. The endorsement, therefore, is not by the *payees* of the note. But if the terms used embrace the *payees*, they had no authority to endorse nego-

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negotiable paper. (Statutes, vol. 6, p. 177 b.) Besides, it was not negotiable. The act concerning promissory notes, (1 R. L. 511,) makes *negotiable*, notes made and signed by any person or by a *factor or agent of any merchant or trader* usually entrusted therewith. It has been decided that a corporation will be regarded as a person in law; but it has not been adjudged that a corporation can be regarded as a merchant or trader. The note declared on was the note of the *agent* of the Mechanic Fire Insurance Company.

*D. Selden & S. A. Foot*, for plaintiff. A corporation has a right to make a note for any legitimate purpose. On its face therefore, the declaration is good. It is averred that in making the note, the corporation acted within the scope of the legitimate purposes of the company; but this was superfluous. If given for an illegal object, it may be shewn on the trial. (7 Cowen, 540. 2 id. 676.)

As to the manner of setting out the note, it is optional to set out the facts, or the conclusion of law upon the facts. (1 Chitty, 302. 6 T. R. 662. 2 Burr. 1188.) Besides setting out the note, here is an express promise to pay. (Chitty on Bills, 357. 1 Salk. 128. 2 Camp. 450.) If the note was illegally or irregularly made or endorsed, the subsequent promises binds the makers, and the note will be considered the consideration of the promise.

The statutes incorporating those companies authorise the transaction of their business by agents; (Statutes, vol. 5, p. 134 a, and vol. 6, 177 b.;) and the court will infer the acts done within the scope of the authority conferred, until the contrary is shewn. (3 Cowen, 684.)

A corporation may bind itself by a promise without seal and is liable to an action thereon. A promise by a principal to pay the note of an agent may be enforced. The plaintiff is the *bona fide* holder of a negotiable note, and entitled to recover, unless notice brought home that the note was illegally made.

*D. B. Ogden*, in reply. The statute incorporating the company, prescribes the mode in which its contracts shall be executed. They must be signed by the president and

counter-signed by the secretary. The act is a public act, and every citizen is bound to know its provisions. The plaintiff, therefore ought not to have taken a note not duly executed. The company was incorporated to affect insurances, not to issue notes; the issuing of a note, therefore, not being within the scope of its ordinary powers, should be held unlawful, unless the peculiar circumstances inducing the act are shewn, so that the court may judge whether justifiable or not. If the defendants were authorised in making the note, the *payees* had no right to invest their funds in such securities, and put them into circulation by indorsement. The promise of a principal to pay the note of his agent, if given in the character of agent, is good, but the note here is that of an individual, and the promise of the company is void by the statute of frauds. Besides, there is no special promise averred.

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*By the Court,* SAVAGE, Ch. J. Several objections are raised to the sufficiency of the first count of the declaration: 1. That the defendants had no authority to make a promissory note; 2. That the note described is the note of John Franklin, and not of the defendants; 3. That it is payable to the president and directors of the Life and Fire Insurance Company, and endorsed by the assistant president and secretary, in their own names; and 4. That the Life and Fire have no authority to endorse negotiable paper.

1. It has been decided, that a corporation is liable upon contracts not under seal, made by their authorised agents, (12 Johns. R. 230,) and upon an implied assumpsit, (14 Johns. R. 118, 19 id. 65,) and also upon a promissory note, (1 Cowen, 513.) It is averred in the declaration, that the corporation in making the note, were acting within the scope of the legitimate purposes of their incorporation; upon the face of the declaration, therefore, the court cannot say that the defendants can not make a valid promissory note. If they can make a valid promissory note for any purpose, this note must be held good till some cause shall be shewn why it is not so. By the act of incorporation of the defendants, (Statutes, vol. 5, p. 131 a.) they are authorised

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to make contracts of insurance, but they cannot use their funds in any banking operations. They cannot, therefore, make a note intended for circulation as bank paper; but I am not prepared to say that they may not give a note for many purposes, as for office rent, for the payment of a loss, for the payment of their officers, or agents or servants employed by them, and for other considerations. If a note has been given which is unauthorised by law, that should be shewn in the defence.

2. It is said, that the note described in the declaration is the note of John Franklin, not of the defendants. The averments in the count are; That the defendants are a corporation, and one John Franklin being president thereof, and being authorised and acting within the scope of the legitimate purposes of the corporation, on the 1st July, 1823, made a promissory note, and delivered the same to the president and directors of the Life and Fire Insurance Company, by which the said John Franklin, as president as aforesaid, promised to pay to the order of the president and directors of the Life and Fire Insurance Company, on demand, the sum of \$3172,40 with interest, for value received. From this description the note must be in the following form: "I John Franklin, president of the Mechanic Fire Insurance Company, promise to pay to the order of the president and directors of the Life and Fire Insurance Company, on demand, the sum of \$3172,40, with interest for value received. John Franklin." Or it may be in this form: "I promise to pay to the order of the president and directors of the Life and Fire Insurance Company, on demand, the sum of \$3172, 40, with interest for value received. John Franklin, president of the Mechanic Fire Insurance Company." In neither form can this be said to be the note of the company. In *Taft v. Brewster*, (9 Johns. R. 334.) the defendants, by the name and description of J. B., T. L. and J. C., trustees of the Baptist society of the town, &c. acknowledged themselves to be bound, &c. The court said, "It is not the bond of the Baptist church. The addition of trustees to the names of the defendants is in this case a mere *descriptio personarum*." In *White v. Skinner*, (13 Johns. R. 307.) the con-

tract was in the name of R. S., W. R. and A. H., as directors of the Granville Cotton Manufactory, and signed, "For the directors, Reuben Skinner." The court said it was Skinner's individual contract. He should have averred and proved his authority from his co-directors. In this case there is an averment that the president was lawfully authorised; but it does not appear that he has acted under the authority; he does not say that he signs *for the company*; he describes himself as president of the company, but to conclude the company by his acts he should have contracted in their name, or at least in their behalf. In *Stone v. Wood*, (7 Cowen, 453,) the defendant described himself "as agent of J. and R. Raymond," but he did not contract in their name: and it was held he was personally liable. So here, though the president, according to the averment in the count, had authority to make a note for the defendants, yet he does not appear to have done so, in a manner to be obligatory upon them. It is unnecessary, therefore, to inquire whether the note was endorsed in such a manner as to authorise an action in the name of the endorsee.

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The defendants are entitled to judgment on the demurrer, with leave to the plaintiff to amend on payment of costs.

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JACKSON, ex dem. vs. IRELAND.

THIS was an action of ejectment, tried at the Rensselaer circuit, in July, 1828, before the Hon. WILLIAM A. DUER, one of the circuit judges.

The plaintiff claimed to recover a moiety of 75 acres of land. He shewed a mortgage, executed by John Ireland, of a moiety of the 75 acres, bearing date the 8th April, 1825, a foreclosure of the same, and a purchase by and a conveyance to the lessor of the mortgaged premises; and after

Where a deed of a tract of land to three grantees recites a will devising the same land to one of the grantees during widowhood, and the remainder in fee to the others; declares its object to be

to carry into effect the intention of the testator; and then grants the premises to the three persons in fee, "*Habendum* to them, their heirs and assigns, in the manner mentioned in the said will," the *habendum* is not inconsistent with, and will control the premises.

Although the testator, at the time of the making of the will, had no legal estate in the premises, the grantees in the deed, and those claiming under them, *estopped* from setting up any title inconsistent with that conveyed thereby.

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shewing John Ireland in possession, against whom the suit was originally commenced and a judgment by default entered, rested his cause; the present defendant, Sarah Ireland, having been admitted to defend as landlady.

The defendant proved that her husband, Thomas Ireland, died in 1811, in possession of the 75 acres of land, having resided upon the same for many years, under an agreement with the corporation of Albany, to whom the land originally belonged; that at the time of his death, he left the defendant, his widow, and several children in possession. The will of Thomas Ireland, bearing date the 23d November, 1811, was read in evidence; by it the testator devised his homestead farm unto his wife Sarah during her widowhood, and the remainder in fee to his two sons, John and James, charging them with the payment of legacies to his other children. The defendant produced in evidence a deed of the 75 acres of land from the corporation of the city of Albany to Sarah Ireland, John Ireland and James Ireland, bearing date the 10th March, 1817; whereby, after reciting a purchase of the land by Thomas Ireland, in 1807, of the corporation and the devise of his property by will as above mentioned, the deed proceeds to state, that "in order to carry into effect the intention of the said Thomas Ireland as contained in his said last will and testament," and in consideration of \$1000 paid, the corporation had remised, released and quit-claimed, and thereby did remise, &c. unto the "parties of the second part, and to their heirs and assigns forever," the said 75 acres. "To have and to hold the same to the said parties of the second part, their heirs and assigns, in the manner mentioned in the said last will and testament of Thomas Ireland, deceased." The defendant further proved that Thomas Ireland, in his life time, entered into a contract with the corporation of Albany for the purchase of the premises conveyed by the deed; that, failing in the payment of the stipulated price, he was sued on the contract, which suit was pending at the time of his death. Upon this evidence, a verdict was taken for the plaintiff, subject to the opinion of this court.



*S. A. Foot*, for plaintiff. The deed from the corporation of Albany vests a title in fee to the 75 acres in the grantees as tenants in common; and the lessor of the plaintiff having acquired the interest of John Ireland, one of the grantees, is entitled to recover one third of the premises, unless the *habendum* clause in the deed from the corporation shall be considered as controlling the premises or granting words, which it is conceived it cannot do. The rule is inflexible that an *habendum* cannot stand which is repugnant to the estate granted in the *premises*. The *habendum* is allowed to stand when it is consistent, but not when it is incongruous with the premises. (3 Cruise, 430, tit. 32, Devise, ch. 23, sect. 43. 4 id. 433, tit. Deed, ch. 23, sect. 51, 52.)

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*R. Bogardus*, for defendant. The *habendum* may lessen, enlarge, explain or qualify the estate granted; and such is its operation here. It is not inconsistent with the premises. The deed recites the will, and intends to give effect to it by declaring that the grantees shall hold in the same manner as they would have under the will. The lessor of the plaintiff, claiming under one of the grantees, is *estopped* by the deed from denying the right of the defendant to hold in conformity to the devise.

*Foot*, in reply. The will can have no operation, as the testator had no estate which he could devise. He had not even a right of entry. All he could claim was a mere equity. (6 Cruise, tit. 38, Devise, ch. 3 § 26, 27, 28.) The lessor of the plaintiff was a *bona fide* purchaser under a mortgage sale, and is not estopped.

*By the Court*, SUTHERLAND, J. The *habendum* clause in the deed from the corporation of Albany to John, James and Sarah Ireland, is not inconsistent with the *premises* or granting part. The deed recites the will, and the object of all the parties was to give effect to it by means of this conveyance. The legal effect of the deed is the same as though the *habendum* clause, instead of saying, "To have and to hold to the said parties, in the same manner, mentioned in the last will and testament of Thomas Ireland, deceased," had, without any

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reference to the will, given the estate to the defendant *during her widowhood*, and the remainder to the two sons in fee.

There can be no question that the estate granted may be thus designated and made certain in the *habendum* clause. It enlarges and explains, but is not inconsistent with the previous part of the instrument. (3 Cruise, 430, 4 Cruise, 433, and 6 Cruise, tit. 38, Devise, ch. 3, sect. 26, 27, 28.) No doubt the premises in a deed must control when the *habendum* clause is inconsistent with it.

Admitting the devise to have been inoperative for want of a legal estate in the testator, the grantees in the deed from the corporation, and those claiming under them, are estopped from setting up any title inconsistent with that conveyed by that instrument. The defendant, therefore, has the exclusive right to the possession of the premises in question during her widowhood; and the lessor of the plaintiff, who claims under a mortgage given by one of the sons, cannot recover.

Judgment for the defendant.

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THE UTICA INSURANCE COMPANY vs. BADGER.

*Proof of hand writing of the endorser of a note, going no farther than that the witness believed it to be the hand writing of the endorser, founded upon the facts of having seen him write his name two*

THIS was an action of *assumpsit*, tried at the Oneida circuit, in April, 1828, before the Hon. NATHAN WILLIAMS, one of the circuit judges, on a promissory note by the plaintiffs, as second endorsees, against the defendant, as maker.

The declaration stated the making of the note by the defendant (Luther Badger) to Stephen Hungerford and John Ainslee, bearing date 7th December, 1825: an endorsement by the payees to Crocker and Badger; and a second endorsement by them to the plaintiffs. On the trial of the fact alone of having seen him write five years ago, and expressing doubts as to a part of the signature, would scarcely be sufficient to uphold a verdict, if the question as to its sufficiency had been properly submitted to a jury.

Where a judge upon such evidence, in an action by the endorsees of a promissory note, charged the jury that the plaintiffs were entitled to a verdict, instead of leaving it to them, under proper instructions, to say whether the endorsement was or was not the hand writing of the party, a new trial was granted.

cause, the making of the note and the endorsement by the payees was admitted. A witness for the plaintiffs testified that Isaac Crocker and Luther Badger were co-partners in trade in September, 1825; and that he believed the name Crocker and Badger endorsed on the note to be the proper hand writing of Badger. He saw Badger write his name in February, 1828, and had seen him write five years since, but would not have been able to have testified to his hand writing from the fact alone of having seen him write five years since; that he made up his opinion from looking at his hand writing which he saw him write in February last. He could not say that the name *Crocker*, forming part of the signature, was the hand writing of Badger. It did not look like his. Both names appeared to have been written with the same hand; but he never saw Crocker's name written by Badger, and therefore could not testify with certainty as to that name. Upon this evidence, the plaintiffs offered to read the note to the jury. The defendant objected to the sufficiency of the proof. The judge overruled the objection, and the note was read. The defendant excepted.

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On the part of the defendant, Stephen Hungerford, (one of the payees,) testified that the note was endorsed by the payees for the accomodation of the maker; that he had often seen Badger write; that he did not think the name Crocker and Badger looked like Badger's hand writing exactly; he rather thought that it was not his hand writing; both names appeared to be written by the same hand; the word *Crocker* did not resemble Badger's hand writing.

Upon this evidence, and other testimony in the case, not relating, however, to the proof of hand writing, the judge charged the jury that the plaintiffs were entitled to a verdict. The jury found accordingly. The defendant excepted to the charge. The other testimony given on the trial is not stated, as it presented questions not passed upon in the opinion of the court. A motion was now made to set aside the verdict.

*J. A. Spencer*, for defendant.

*S. A. Foot*, for plaintiffs.

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*By the Court, MARCY, J.* The plaintiffs having set forth in their declaration the transfer of the note from Crocker and Badger to themselves, were bound to prove it. There was proof that Crocker and Badger were partners. It was therefore only necessary to shew the endorsement by either of them. (Bayley on Bills, 40.) There was no proof whatever that the endorsement was made by Crocker; and so light was the evidence of its having been made by Badger, that it would have been scarcely sufficient to uphold a verdict for the plaintiffs, if the question as to its sufficiency had been properly submitted to the jury. I think the judge erred in not leaving it to the jury, under proper instructions, to say whether the endorsement was or was not the hand writing of Badger. On this ground, I am for granting a new trial. It is not necessary to consider the other points raised on the argument.

New trial granted.

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MOORE vs. WAIT and GRIFFIN.

A person entering into the possession of wild, uncultivated land, under a contract of sale giving him a right of entry and occupancy, and reserving to the landlord the land as security until the payment of the consideration money by withholding the deed, has a right to enter and enjoy the land for agricultural purposes. THIS was an action of *trover*, tried at the Clinton circuit in January, 1828, before the Hon. REUBEN HYDE WALWORTH, then one of the circuit judges.

On the trial of the cause it appeared, that the plaintiff was the owner of a certain lot of land; that on the 18th day of October, 1825, he entered into an agreement with John S. Frazer, whereby he demised to Frazer the west half of the lot for the term of four years from the 15th day of June next, *on condition*, that Frazer should pay to the plaintiff at the rate of \$3 per acre, for the land demised, by installments, viz. one fifth thereof on the said 15th June, and the residue in four equal annual payments, with interest annually, and should pay the taxes, &c. On performance of these conditions, the plaintiff bound himself to execute to Frazer a good and sufficient deed of the premises. In the summer or fall

If such person cuts timber for any purpose other than the cultivation, improvement and enjoyment of the land as a farm, the timber thus separated from the freehold, becomes the personal property of the owner of the inheritance, who may maintain an action of *trover* for it, against any one in possession though a *bona fide* purchaser under the occupant.

of 1826, James F. Frazer bought of John S. Frazer a number of *pine trees* standing on the lot, paid for and cut them into saw logs, to the number of 800, and drew them to the bank of the river, where he sold them to Griffin, one of the defendants, who, by his agent Wait, the other defendant, marked the logs, floated them down the river and had them sawed into boards and plank. The plaintiff demanded the logs of the defendants, and brought this action to recover their value.

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At the date of the agreement the whole of the premises described in it were wild and uncultivated; the timber cut was the principal part of the valuable pine timber on the land; it did not appear to have been cut with a view to cultivation; the place where it was cut was not the best land for that purpose, and none of it has been put into a state of cultivation; the value of the lot was greatly reduced by the cutting off of the pine timber. After the timber was cut and the logs taken by the defendants, the agreement between the plaintiff and John S. Frazer was surrendered up.

The presiding judge decided upon this state of facts, that, under the lease, the lessee had a right to enter and enjoy the premises; that as the whole lot was covered with wood and timber, he could not enjoy it without cutting off some part of the trees and timber, and the plaintiff not having restricted him as to any particular kinds of trees he might cut, he had a right to cut such as he pleased and to sell them, subject to be restrained by a court of equity if he committed wanton injury to the property; that the principles applicable to waste, committed on leasehold property, by cutting timber, where a part of the land was cultivated, and could therefore be enjoyed without cutting timber on other parts of it, were not applicable to a case like this; and that the plaintiff, therefore, was not entitled to recover. The plaintiff submitted to a nonsuit, with leave to apply to set the same aside.

*W. Kent*, for plaintiff, now moved to set aside the nonsuit. The agreement conferred no other rights on Frazer than those of a tenant for years. Felling the timber for any oth-

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er than agricultural purposes, was *waste*. Allowing that timber might be cut, it could not be carried to such an extent as to do an irreparable injury to the inheritance. Whether the party in this case had abused the rights which the agreement gave him, should have been submitted to the discretion of a jury, under the charge of the court. It is manifest, that by withholding the deed, the plaintiff looked to the land as his security ; which would be no security if the lessee might render it useless and of no value by stripping it of its timber. (7 Johns. R. 227. 9 id. 35, 332.) It is waste to cut wood for sale. (2 Haywood, 339.) If the seller had no title, the purchaser is liable. (5 Mass. R. 341. 5 Barn. and Ald. 826.)

*S. Stevens*, for defendants. Frazer was in possession under an agreement to sell to him, having a right of immediate entry, and without restraint as to the manner of using the property. Whilst he performed his part of the contract, no action at law would lie against him for cutting timber ; he could be restrained only by injunction from chancery ; and if so, surely an action cannot be maintained against a *bona fide* purchaser of logs cut on the premises.

Supposing Frazer a lessee for years, what was he to do with the land ? It was wild and uncultivated, and he could make no other use of it than what he did. If it be true, that the question might be submitted to a jury to determine whether or not *waste* had been committed by the tenant, the proposition admits that the defendants, as purchasers, cannot be liable ; for if the tenant had a right to cut timber to any extent, the purchaser of such timber cannot in reason or justice be subjected to an action for an abuse of such right, for how could he know that there was such abuse. (16 Johns. R. 74.)

*By the Court*, SAVAGE, Ch. J. It has been decided by this court, in the case of *Suffern v. Townsend*, (9 Johns. R. 35,) that an agreement to sell land does not imply a licence to enter and cut trees ; and also that a licence to enter, would not authorize the cutting timber ; for that one licence does not imply the other. In that case, there was a parol con-

tract of sale and purchase, under which the defendant entered and cut timber; but the contract was not consummated, and the plaintiff recovered in trespass for the timber cut while the defendant was in possession. The same point was again decided in *Cooper v. Stower*, (same vol. 331.) In that case there was a written contract, much like the contract in this case, except that there was no lease of the lot; but the defendants produced a contract, signed by Stower, by which he acknowledged he had received a contract and bond for the consideration money, which were to be executed and returned to the plaintiff; and agreed that until the papers were executed, no timber should be cut on the lot; and it was shewn that they were executed and returned by the next mail. The defendants contended that a licence to enter was implied. The court considered the acceptance of the contract of Stower a licence to enter and occupy as tenants at will, but not to commit waste; and that cutting the timber beyond what was necessary for the use and improvement of the farm terminated the tenancy at will; and of course the defendants were trespassers. It was there considered that the withholding the deed was the plaintiff's security upon the land; but it would cease to be a security, if the defendants might lawfully strip the land of its timber, and render it of no value.

\* The contract in this case goes farther, and gives the right of occupancy for a term of years, on performing certain conditions. It is undoubtedly true, that Frazer had a right to enter and enjoy the lot which he had contracted to purchase; but, as was said in *Cooper v. Stower*, "the contracts in the case must be construed reasonably and consistently with the rights of both parties;" and as cutting off the pine timber where the land was not suitable for cultivation, was not the proper and reasonable mode of enjoying the lot for agricultural purposes, Frazer had no right to cut the timber. The timber constituted the principal value of the land. The land thus valuable was the plaintiff's security for the purchase money; and the destruction of the timber was therefore totally unauthorized by the contract. Had it appeared that the lessee could not enjoy the lot to the best advantage for the purposes of cultivation and improvement as a farm with-

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out cutting the timber in question, a different case would have been presented; and I should think the rights of the parties would be very different: then the cutting, and perhaps the selling would have been justifiable. But when trees, or any thing else attached to the freehold, are unlawfully detached therefrom, the property thus wrongfully separated from the freehold, becomes the personal property of the owner of the inheritance. "Waste is a tort," says Lord Hardwicke, (3 Atk. 262,) "and punishable as such; and the party has also a remedy for the trees cut down, by an action of trover." (2 Cruise, 268.) The case of *Fanant v. Thompson*, (5 Barn. & Ald. 826,) is full to the same point. Certain machinery attached to a mill was leased for a number of years. The tenant, without permission of his landlord, severed the machinery from the mill, and in that situation it was sold on an execution against the tenant. It was held that no title passed to the purchaser, and that trover lay for the machinery. The judges, in giving their opinions, compare the machinery, when attached to the freehold, to the case of trees standing which are parcel of the inheritance, to the use of which the tenant has a qualified right during his term, to wit, for shade and fruit. If, however, they are separated by his own wrongful act, or the act of God, the tenant has no right to the use during his term, but they become absolutely vested in the person who has the next estate of inheritance; they become his goods and chattels.

These cases abundantly shew what is constant to good sense and sound policy, as well as justice: that a tenant who commits waste by cutting timber, acquires no title to the timber which he thus unlawfully cuts, and of course can convey none; and further, that a *bona fide* purchaser from the tenant acquires no title, but is liable in trover to the true owner.

The facts of the case clearly shew that the timber was unnecessarily, and therefore unlawfully cut by Frazer. The logs in question were therefore the property of the plaintiff. The nonsuit must be set aside, and a new trial granted; costs to abide the event.



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R. & W. WIGHT.

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v.  
Wright.

THIS was an action of ejectment, tried at the Columbia circuit, in April, 1827, before the Hon. WILLIAM A. DUER, one of the circuit judges.

The lessors of the plaintiff, who are the daughters and sons-in-law of one *Jacob Elias*, claimed to recover the moiety of a farm, of which the defendant, *Rachel Wight*, (the widow of Jacob Elias,) and her son, William Wight, by a second marriage are in possession. They claimed as the heirs of law of Henry Elias, (a son of Jacob Elias,) who died in 1808, leaving no wife or children. Jacob Elias died in 1786, seised of a farm containing about 200 acres of land, the west half of which, on a partition amongst his children in 1806, was conveyed to his son Henry, and the east half was conveyed to the other children. The east half was subsequently acquired by the defendants by purchase. The defendant, Rachael Wight, since the death of her first husband, Jacob Elias, has continued to reside on the farm of which he died seised. Her son Henry resided with her until his death.

The defendant claimed to hold the premises under the will of her husband, until provision was made for her maintenance, conformably to the directions of that will. The will of Jacob Elias was dated in October, 1786. By it, the testator gave and devised all his estate, real and personal, to his children, to take possession thereof on their severally becoming of full age. After thus disposing of his property, the will proceeds in these words: "My will and pleasure is, that my beloved wife Rachel shall hold, use, occupy and enjoy my whole estate, as well real as personal, until the time mentioned above for my children severally taking possession thereof; provided always, and it is my express will and pleasure, that my said children shall severally, before they take any possession of my estate, give severally such good and sufficient security for their proportion, according to their said several shares of my estate, for and towards such a competent maintenance of my

Where a testator, after devising all his estate, real and personal, to his children, to be taken possession of by them on their severally coming of age, added a clause declaring his will to be, that his wife should hold the whole estate until his children severally came of age; and that they severally, before they took possession of his estate, should give security according to their several proportions of the estate, for and towards a competent maintenance of his wife during her natural life; it was held, that the wife of the testator was entitled to retain possession of the estate until provision was made for her by her children in the manner directed by the will.

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said wife during her natural life, as two indifferent men, to be chosen mutually between my said wife and such child or children, so to be obligated, shall judge sufficient."

There was an unsuccessful attempt made on the trial to shew that Henry, the son of the defendant Rachel, had complied with this clause of the will; and evidence was also given to shew the nature and character of the possession of the farm by Henry, after the partition in 1806, until his decease in 1808. The cause, however, was disposed of at the circuit on a construction given to the will of Jacob Elias by the presiding judge, who charged the jury that by it, the defendant, Rachel Wight, had no right to possess the real estate longer than until the children of the testator came of age; and that the provision for her maintenance did not postpone the right of entry of the devisees until they gave the security mentioned in the will, but operated only as a charge upon the land; and that the plaintiff was entitled to recover. The jury found accordingly. A motion was now made to set aside the verdict.

*A. L. Jordon*, for defendants. The will of Jacob Elias gave to his widow a life estate by necessary implication, subject to be defeated only by the children executing securities for her maintenance, in compliance with the terms of the will. This manifestly was the intent of the testator, and therefore ought to prevail.

*E. Williams*, for plaintiff. The widow must be presumed to have consented to the partition. She became a purchaser under it, in buying in the east half of the farm. The intention of the testator was, that if one or more of his children came of age, and required the possession of his or their share, before all the children arrived of age, such children requiring the possession should give the security prescribed by the will; but it was not his intention that the widow should continue in possession after they all arrived of age. On the contrary, he had declared that on their coming of age, they should take possession; and he authorised her to hold only until that event. He made provision for her maintenance, and it was

a charge upon the estate; but the devise to the children is not subject to any condition, nor is their right of entry dependant upon the performance of the requirements of the will.

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*By the Court, SUTHERLAND, J.* It is not denied that the lessors are bound to provide for the defendant. But it is contended that they are entitled to the possession of the estate, *charged with the support of the defendant*; and that making provision for her support is not, according to the true construction of the will, a condition upon the performance of which their right of entry depends. The case depends then upon the construction to be given to the will of Jacob Elias.

It was evidently the intention of the testator to make a certain and competent provision for the comfortable support of his wife. He accordingly gives to her the use of his whole real and personal estate during the minority of his children, and expressly directs that the children, before they shall take possession of the estate, shall give satisfactory security for the competent maintenance of their mother. He put her in possession of his whole estate, and he did not intend that she should be deprived of such possession until other provision was made for her. A mere right of action against the lessors, together with a charge upon the estate for a sum equal to the support of the defendant, would leave it in the power of the lessors, temporarily at least, to deprive her of a home and the means of support, if they thought proper to avail themselves of the delay which the law would enable them to interpose against her demand. It appears to me that the testator intended to put the provision for his wife beyond all hazard; he gave her the possession of his whole estate, which he meant she should retain until other provision was made for her by her children in the manner directed in the will. This is the natural and plain construction of the instrument; it carries into effect what was evidently the cardinal object of the testator. If I am correct in this view of the case, the judge erred in the construction which he gave to the will, and a new trial must be granted.

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The evidence as to the possession of Henry Elias of the premises in question, after the division which appears to have been made between the children, is somewhat contradictory. If that was a point relied upon by the plaintiff, it should have been submitted by the court to the jury as a matter of fact. The court, however, without, adverting to that point, expressed a decided opinion against the defendant upon the construction of the will.

New trial granted.

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R. M. & J. RUSSELL vs. F. H. & H. W. NICOLL.

A contract made in the city of New-York for the sale of 500 bales of cotton, to be delivered on its arrival at New-York from New-Orleans, at any time between the date of the contract, which was the ninth day of February, and the first day of June thereafter, to be paid for in cash on delivery, the cotton to be weighed, and two per cent. tare to be al-

THIS was an action of assumpsit, tried at the New-York circuit, in March, 1828, before the Hon. OGDEN EDWARDS, one of the circuit judges.

The plaintiffs claimed damages for the non-delivery of a quantity of cotton alleged to have been purchased by them of the defendants. The contract between the parties was made on the 9th February, 1825, at New-York, and is in these words: "Sold by Daniel Rapelye, for our account, to R. M. & J. Russell, five hundred bales of cotton, at sixteen and an half cents per pound. Said cotton was purchased for our ac. at Huntsville, and is to be delivered, on its arrival at this port from New-Orleans at any time between the present date and the first day of June next, and the amount to be cash on delivery; to be re-weighed and two per cent. tare allowed. New-York, February 9, 1825." (Signed) 'Fran-

lowed, is an executory contract, and the title to the cotton does not pass. The vendors are not chargeable for the non-delivery of the cotton *until its arrival* at New-York; and the specification of the time is only a limitation fixing the period beyond which neither of the parties are bound by the contract, and not an agreement that the cotton shall at all events be delivered by the specified day.

A party contracting for the sale and delivery of a large quantity of any particular item of merchandise, (for instance 500 bales of cotton,) *on its arrival* at a particular port, is not bound to deliver a portion only of the article, the whole not having arrived. The vendee not being bound to receive, the vendor is not obligated to deliver a quantity less than the whole; the obligation being reciprocal.

A signing of a note or memorandum of a bargain on the sale of goods, wares and merchandise by the vendors alone, is a sufficient compliance with the requirements of the statute of frauds.

The word *sold* at the commencement of such a writing, means, *contracted to sell*.

cis H. Nicoll & Co.' The cotton, at the time of the sale, was at Huntsville, in the state of Alabama. The average time of a passage from New-Orleans to New-York is twenty days, and forty days would be a very long passage. Eleven bales of Alabama cotton, belonging to the defendants, arrived at New-York before the 1st June, were demanded by the plaintiffs, and an offer of payment made to the defendants two or three days previous to the 1st June, who refused to deliver the same, saying they would not embarrass the contract by the delivery of a part; that unless the whole of the 500 bales arrived before the 1st June, they were not bound to deliver any part of the cotton. The price of Alabama cotton in New-York, from about the middle of April to the 1st of June, fluctuated between 23 and 25 cents per pound. The average weight of a bale of such cotton is 350 pounds.

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The plaintiffs offered to prove, that on the 21st day of June, they offered to accept and receive the cotton. This evidence was objected to and rejected, and the plaintiffs excepted to the decision of the judge. The plaintiffs having rested, the defendants' counsel moved for a nonsuit, insisting that the agreement to deliver the cotton was conditional, depending upon the contingency of its arrival at the port of New-York on or before the first day of June; that it was an entire contract for the delivery of the whole quantity of 500 bales, and that consequently the defendants were not bound to deliver, nor the plaintiffs to accept a less quantity than the whole; and that the plaintiffs, not having offered any evidence of the arrival of the whole quantity, they were not entitled to recover. The judge decided that the plaintiffs were bound to prove that the whole quantity had arrived at New-York on or before the first day of June, to entitle them to a recovery; and that they had not offered sufficient evidence to justify him in submitting the cause to the jury; whereupon he nonsuited the plaintiffs, who excepted to his decision. A motion was now made to set aside the nonsuit.

*T. Fessenden*, for plaintiffs. The defendants were bound to deliver the cotton at New-York by the first of June *at all events*. In determining the import of a contract, a court will

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regard the situation of the parties, and the circumstances under which they act at the time it is made. (2 Barn. & Cres. 636. 2 Cowen, 228. 8 Mass. R. 214. 10 id. 384.) The cotton was at Huntsville; it was to be transported to New-Orleans, and thence to New-York; the sale was made; and the defendants stipulated to deliver it *on its arrival* at the port of New-York: but as that was too indefinite, the plaintiffs required that a time should be specified; and the defendants further stipulated that it should be delivered on or before the first day of June. The agreement to *deliver* applies as well to the *time* specified, as to the *arrival* of the cotton; and if so, the meaning of the contract is, that the cotton is to be delivered on its arrival, *and* it is to be delivered between the date of the contract and the first day of June; or, in other words, it shall be delivered on its arrival, which arrival shall be between the date of the contract and the first day of June. Unless this construction be adopted, there is no reciprocity in the contract. If cotton rose in market, the defendants might sell at New-Orleans, and thus prevent its arrival in New-York; on the happening of which event alone, according to their construction, they were bound to deliver. If it fell in market, they could make its arrival sure; for three voyages to and from New-Orleans might have been performed between the date of the contract and the 1st June. In *Boyd v. Siffkin*, (2 Camp. 326,) and in the case mentioned in the note in that page, the general words *on arrival* are construed as a condition precedent; but in those cases there was no *time* specified for the delivery, and the subject matter was as much beyond the control of the vendor as of the vendee. Here time is specified, and the article completely under the control of the vendor.

The evidence produced by the plaintiffs, was *equivalent* to proof of the arrival of the cotton previous to the first day of June. It was shewn that a voyage between New-Orleans and New-York was ordinarily performed in 20 days; the cotton might have been transported; in fact a portion of this very cotton arrived previous to the first of June. The plaintiffs could not have proved more, had the whole of the cotton arrived at New-York, unless the defendants had seen fit

to apprise them of the fact. In cases of this kind, where the facts rest peculiarly within the knowledge of the opposite party, slight evidence is sufficient to establish a *prima facie* case. The jury would have had the right to presume that the arrival had been prevented by the act or omission of the defendants; and if so, the rights of the plaintiffs were the same as if the arrival had taken place. (3 Camp. 274.)

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The plaintiffs were entitled to recover for the eleven bales which did arrive. In this respect, the contract should be considered *distributive*; otherwise, if 499 bales had arrived and the remaining one had been missing, the defendants would have been relieved from the contract. Besides, the sale was absolute and the property passed, although the plaintiffs were not bound to pay until actual delivery. Such sales are recognized as good. (2 Comyn on Cont. 210, 230. Touchstone, 224. Noyes' Maxims, 88. 3 Camp. 426.) If the sale was absolute, the plaintiffs were entitled to recover.

*D. B. Ogden and W. Slosson*, for defendants. The sale was conditional, not absolute. The note or memorandum is in the usual form of a broker's memorandum of sale, and is like the case in 2 Camp. 320, where the word *sold* was adjudged to mean *contracted to sell*. Whenever any thing remains to be done, the contract is of necessity executory, although the words used may be *in presenti*, and in such cases the title to the property, which is the subject matter of the contract, does not pass. (15 Johns. R. 349. 6 Cowen, 250.)

The arrival of the cotton was a condition precedent; it was to be weighed, and the delivery and the payment were to be simultaneous acts. The contract, therefore, was executory, and the plaintiffs were bound to aver and prove the arrival of the cotton. Had the cotton been lost in its *transit* from New-Orleans, the defendants would have been compelled to bear the loss, and a better test cannot be applied to determine the question of sale or no sale. If, however, there was a sale the plaintiffs have mistaken their remedy; their action should have been *trover*.

The sale was conditional. The cotton was at Huntsville, on the head waters of the Tennessee, a river not at all times

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navigable ; the contract accordingly provided for the contingency, that the cotton might not arrive. The agreement is, that *on its arrival* at the port of New-York, it shall be delivered. The specification of time in the contract, was to fix a limit to the obligations of the parties ; a definite period, beyond which neither should be bound. It is not a stipulation that at all events the cotton should arrive by the first of June, but an agreement on the one part to deliver, and on the other to receive, if the cotton did arrive by that day. The case in 2 Campbell, 326, 7, 8, is decisive of this question. There the sale was of a quantity of hemp *on arrival*, per a certain ship ; the ship arrived, but brought no hemp ; and it was holden that as none arrived, the contract was at an end. In the case in Campbell, the purchaser was bound to receive the article whenever it arrived ; here the plaintiffs were bound to take it, if it arrived before the first of June.

As to the eleven bales. The defendants were not bound to deliver a part. The agreement was made in reference to the entire quantity of 500 bales of cotton, and no agreement was made for the sale or purchase of a less quantity. The plaintiffs could not have been compelled to take a quantity less than the whole, and the defendants therefore are not bound. Either party had a right to insist upon a performance of the whole, and neither was bound to perform in part (3 Johns. R. 534.)

To entitle the plaintiffs to recover, they are bound to prove the arrival of the cotton : substantively to prove the fact, and not by inference. No evidence was offered, that the non-arrival of the cotton was attributable to the defendants ; and no presumption will be indulged of bad faith on their part. But had there been fraud on the part of the defendants, evidence of the fact could not have been received in the present action of assumpsit ; the remedy of the plaintiffs would have been an action of deceit, and so it was ruled by the king's bench in the case in Campbell.

The plaintiffs, in an action against them, might have objected the statute of frauds as a defence, not having signed any note or memorandum in writing of the bargain ; the agreement produced was signed only by the defendants. If



the plaintiffs could not have been holden, the defendants are not bound; and though this objection was not taken at the circuit, the court will not now grant a new trial, if they perceive that the plaintiffs must be nonsuited on this ground. For the same reason that the plaintiffs were not bound to receive the cotton after the first of June, the defendants were not obligated to deliver it after that day. The evidence upon that subject, therefore, was properly excluded.

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*H. Ketchum*, in reply. The sale was absolute, The cotton was identified and specifically sold, to wit, 500 bales purchased for the defendants at Huntsville. Had it been lost on its passage from New-Orleans, it is admitted that the defendants would have been obliged to have borne the loss; but this would have been as a consequence of the contract, and not because they remained owners. Having agreed to deliver it at New-York, they became their own insurers. This is according to the course of trade. The agreement was positive that the cotton should be delivered by the first day of June, and *sooner*, if it arrived before that day. Such must be the construction of the contract, and not as contended for on the other side, that there was no obligation on the defendants unless the cotton actually arrived before that day, or the grossest folly is imputable to the plaintiffs. The plaintiffs were bound to pay, and the defendants should be holden to deliver. The stipulation that the cotton should be weighed, did not render the contract executory, the sale being of a specific article; the weighing was provided for, solely to ascertain the quantity, and is not such a circumstance as prevents the passing of the property. (4 Taunton, 643.) The plaintiffs might have claimed the cotton at New-Orleans, and waived the delivery at New-York, the stipulation that it should be delivered there being entirely for their benefit. A subsequent sale, by the defendants, would have been void. The plaintiffs, therefore, at all events, were entitled to recover for the eleven bales; and they were entitled to recover for the non-delivery of the whole quantity, even upon the principles assumed by the defendants, for the property being in their

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possession at the time of the contract, and remaining under their control, to exonerate themselves from liability, they ought to have shewn its non-arrival at New-York.

*By the Court, MARCY, J.* It was insisted on the argument that the contract declared on was within the statute of frauds, and void for not being reduced to writing, and signed as the statute directs. This objection is not sustainable. If the contract be within the statute, it is very clear that the signing by the defendants is a compliance with its requirement. (*Egerton v. Mathews and another*, 6 East, 307. *Sanderson v. Jackson and another*, 2 Bos. Pul. 238.)

The main difficulty in this case is to determine the real character of the contract. On the one hand, it is said to be an actual and unconditional sale of the cotton, with a warranty that it should arrive at the port of New-York by the first of June, 1825; on the other, that it is an agreement to sell, on condition that it should arrive before that time. It is very clear that if the plaintiffs had brought trover for the cotton, they could not have sustained their action. The cases of *M' Donald v. Hewett*, (15 Johns. Rep. 349,) *Rapelye & Smith v. Mackie & others*, (6 Cowen, 25,) and *Shepley v. Davies and another*, (5 Taunt. 607,) are decisive authorities upon this point. The contract was therefore executory and not executed. Something was to be done before the title to the cotton passed from the defendants to the plaintiffs. It was to be brought to New-York, weighed there, and paid for by the plaintiffs, after making the deductions stipulated in the agreement. The defendants could retain the possession of it, even after it arrived in New-York, for the purpose of weighing it and until it was paid for by the plaintiffs. The payment and delivery were dependant and simultaneous acts. Apply to this property the test mentioned by Spencer, J. in the case of *M' Donald v. Hewett*, who would have been the sufferers if the cotton had been lost on its voyage from New-Orleans to New-York, or while at the latter place, before it had been weighed? Beyond all question, the loss would have fallen on the defendants.

The contract being executory, it is important to determine what was to be done by the defendants towards executing it; because it is for not doing what they had stipulated to do, or cause to be done, that they are liable, if at all, to the plaintiffs for damages. If the contract be executory, and such it evidently is, the same interpretation must be given to the word *sold* that was given to it in the case of *Boyd v. Siffkin*, (2 Campb. 326.) It means *contracted to sell*. Giving it this interpretation, I understand the contract to be an agreement on the part of the defendants to sell five hundred bales of cotton, purchased on their account at Huntsville, and to deliver it on its arrival at New-York, at any time after making the contract, and before the first day of June thereafter. It could not be delivered until its arrival, and its weight ascertained. The stipulation by the defendants to deliver it, cannot be considered absolute: it was conditional, and they are not chargeable for the non-delivery of it until the event had happened which the parties must have expected to happen before the delivery, viz. its arrival at the port of New-York.

It was urged on the argument that, by the agreement, the defendants had stipulated that the cotton should arrive within the period specified in the contract. Such, I apprehend, was not the object of designating the time; but, as the fulfilment of the contract, or, in other words, the actual transfer of the property contracted to be sold, depended upon the arrival of the cotton at New-York, an event not absolutely within the control of either party, and which might never happen, the period for its delivery, on condition of its arrival, was fixed, that the parties might know how long they were to remain under the stipulations of the contract. If the cotton should not arrive by the first of June, the plaintiffs were not bound to receive and pay for it, on the one hand; nor on the other, were the defendants under an obligation to deliver it. This appears to me to have been the object of a specification of time in the contract.

Eleven bales of cotton did arrive within the specified time, and the defendants refused to deliver them, because the whole five hundred bales were not received. Their views of the contract in this particular appear to me to have been cor-

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rect. The contract was for five hundred bales; it was entire; there was no obligation on the part of the plaintiffs to receive a less quantity than the whole, and consequently none on the part of the defendants to deliver less than the whole.

The obligation to deliver and to receive must be reciprocal. This construction of the contract was resisted on the argument, upon the ground that it imputed great folly to the plaintiffs in becoming bound to receive the cotton, however low it might be depressed in price; while the defendants could avail themselves of the advantage of its improved value, by preventing its arrival within the stipulated time. There is no proof nor pretence that any act was done by the defendants to retard the arrival of the cotton. If nothing was done to control the contingent event upon which the delivery was to be made, the benefit or loss likely to result from its happening was mutual; and if any thing was done to control it, the party injured thereby would have a remedy.

I see no cause for interfering with the decision of the judge at the circuit.

Motion to set aside nonsuit denied.

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#### THE PEOPLE vs. WALBRIDGE.

By the "act to prevent abuses in the practice of the law," (Statutes, vol. 4, 278, c.) attorneys and counsellors at law are prohibited from the purchase or receiving of any promissory note, &c. except in payment for estate real or personal sold, for services rendered, for a debt antecedently contracted, or for the purpose of making remittance, although such note, &c. be not purchased for collection, or for the purpose of bringing a suit thereon.

CASE brought up from the Rensselaeroyer and terminer for the advice of this court. The defendant was indicted, for that on the 20th day of April, 1824, he did buy of one J. B. Souza a certain promissory note, bearing date the 14th April, 1824, made by one William McMurray, for the sum of \$125, 50, payable to A. V. Adriance or order in ninety days, endorsed by the payee to Souza, who was the holder and proprietor thereof until the purchase thereof by the defendant, for a good and valuable consideration; he, the said defendant, at the time of such purchase, being an attorney and counsellor of this court, and of the court of common pleas of the county of Rensselaer; and that the defendant did not buy

or receive the said note in payment for any estate real or personal, or for any services actually rendered, and for any debt antecedently contracted, or for any purpose of remittance, without any intent to violate or evade the act of the legislature of the state of New-York, entitled, "An act to prevent abuses in the practice of the law, and to regulate costs in certain cases," passed April 21, 1818.\* The defendant was also charged, in other counts of the same indictment, with having bought four other promissory notes given by the said William McMurray, viz. one to Prudence Barton for \$42,60, another to A. V. Adriance for \$125,50, a third to E. Goss for \$31, 20, and a fourth to C. Fairbanks for a sum of money to the jurors unknown. The same averments were made substantially as in the first count of the indictment. The defendant pleaded not guilty, and a trial was had at the Rensselaeroyer and terminer, in June, 1827, before the Hon. WILLIAM A. DUER, one of the circuit judges, and DAVID BUEL, jun. and HERMAN KNICKERBACKER, Esquires, judges of the county courts of that county.

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\*The first section of the act is in these words :

"Be it enacted, &c. That no attorney or counsellor at law of any court of record in this state, shall directly or indirectly buy, or be in any way or manner interested in buying any bond, bill or promissory note, bill of exchange, book debt or other chose in action ; nor shall any such attorney or counsellor, by himself, or by or in the name of any other person, either before or after suit brought, lend or advance, or agree to lend or advance, or procure to be lent or advanced, any money to any person, in consideration of, or as an inducement to the placing or having placed in the hands of such attorney or counsellor, or in the hands of any other person, any debt, demand or chose in action against any other person for collection ; and every such attorney or counsellor offending in the premises shall be deemed guilty of a high misdemeanor, and on conviction thereof, shall be struck from the roll of attornies or counsellors, or both, as the case may be, in the several courts wherein he is licensed ; and shall moreover be subject to fine and imprisonment, or either, as the court before which such conviction shall be had, shall in their discretion think proper and adjudge ; provided always, that nothing herein contained shall be construed to prohibit the receiving in payment, by any attorney or counsellor, any bond, bill, promissory note, bill of exchange, book debt, or other chose in action, for estate real or personal, or for services actually rendered, or for a debt antecedently contracted, or from buying or receiving any bill of exchange, draft or other chose in action, for the purpose of remittance, and without any intent to evade or violate this act."

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On the trial of the cause, the making of the note set forth in the first count of the indictment, and the endorsement of the same by the payee to Souza, were proved. Souza testified that he, in April, 1824, called on the defendant and requested him to purchase the note; that the defendant, on inspecting the note, observed that McMurray was a long winded fellow, and Adriance he considered insolvent; but that if witness would deduct \$10, and endorse the note, he would let him have the money; that witness did endorse the note, received \$115 50, and left the note with the defendant. On his cross-examination, he stated that the defendant said, at the time, he would not buy the note, but that if witness would endorse it and discount \$10, he would let him have the money; that if paid when it became due, well; if not, he should look to witness. The witness further testified, that the note, when due, was protested, and he received notice of non-payment from the defendant, whom he directed to prosecute the maker of the note for the benefit of witness.

The purchase of the note given by McMurray to P. Barton for \$42,60 was proved. The note to Goss for \$31, and the note to Fairbanks, (proved to be for about \$23,) were shewn to have been in the hands of the defendant, who was a justice of the peace, and told McMurray that one McCullough had left them with him, the defendant, for collection, and had taken out two summonses against him (McMurray.) After some negotiation between the defendant and McMurray, the latter gave the defendant his note for \$87, which sum composed of the said two notes and several demands which the defendant had against him. It was admitted, that on the 1st of April, 1824, the defendant was, and at the time of the trial continued to be an attorney and counsellor of this court, and of the Rensselaer common pleas.

The counsel for the defendant urged that the evidence was not sufficient to warrant a conviction, because, 1. The note received by defendant from Souza was not due at the time of its delivery to the defendant; 2. It was left as a pledge to secure the money loaned to Souza; and 3. The three other notes were severally under \$50. The court overruled these objections, and charged the jury that, in their opinion, if the

defendant actually purchased the note of \$125, it was immaterial whether the purchase was made before or after it became due; that it was their province to determine whether he purchased the same or received it as a pledge; that to convict the defendant, the jury must be satisfied that the defendant directly or indirectly bought the note; that if satisfied of such purchase, the defendant, to justify himself, was bound to shew that in making the purchase he came within the words or spirit of the proviso of the act under which he was indicted. As to the other three notes, the court told the jury that, in their opinion, the fact of the notes being severally for less than \$50, furnished no defence; but that it was for the jury to determine, both as to the construction to be given to the act, and whether or no the defendant, in the purchase of the said notes or either of them, came within the spirit of the proviso of the act. The jury found the defendant guilty, and the oyer and terminer suspended judgment until the advice of this court could be obtained.

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*H. P. Hunt*, for defendant. The object of the statute under which the defendant is sought to be convicted is, to prevent the purchase by the attorneys of notes, &c. *with the intent* to commence suits thereon. The act of 1818, (Statutes, vol. 4, p. 278, c.) referred to in the indictment, creates no new offence. The general "act concerning counsellors, attorneys and solicitors," passed in 1813, (1 R. L. 417, § 7,) had already declared it a misdemeanor for an attorney to purchase a note, &c. with the intent to sue; and the sole object of the act of 1818 was to obviate objections as to proof, which, under the former act, was necessary, and yet difficult to be produced. The public prosecutor was bound to aver and prove *the intent* with which the purchase was made. By the act of 1818, the burden of the proof is cast on the accused. In 1 Cowen, 458, Mr. Justice Sutherland, in speaking of these statutes, says they are in *pari materia*, and thus supports the construction we contend for. Unless we are right, an attorney cannot pay the debt of his father and retain the security, without subjecting himself to the danger of being struck from the roll. The *second* section of the act of 1818, shews the intent of the legislature in the *first* section, under which this

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prosecution is had. By the second section, a defendant sued on a note, &c. is allowed to plead that the note, &c. was *bought or received for prosecution*, contrary to the provisions of the act; and on proving the fact, is entitled to demand a nonsuit. It has been supposed that because the act of 1820, (Statutes, vol. 5, p. 141, b,) extending the prohibition to the purchase of notes, &c. to justices of the peace, forbids such purchase, "for the purpose of commencing any action thereon," that such act is a legislative exposition of the act of 1818; that in one case the illegality is made to consist in the *intent*; in the other, in the simple fact of *purchase*. It is denied that this is a fair deduction. On the contrary, we contend that the act of 1820 has explicitly declared, what we say is the spirit of the act of 1818. If this view of the act be correct, then there is no offence charged in the indictment; for there is no allegation that the notes were bought with the *intent* to sue, and the jury were misdirected when told that unless the defendant brought himself within the *proviso* of the act he must be convicted. The legislature, in the *Revised Statutes*, (vol. 1, p. 288,) in re-enacting the law of 1818, have made the offence to consist in the purchase of a note, &c. *with the intent* of bringing a suit thereon.

In indictments for offences created by statutes, it is not enough merely to pursue the description of offence in the words of the act. It should be alleged that an offence *against the public* has been committed. Thus, in this case it should have been averred not only that a note was bought, but that it was bought with the intent to commence a suit upon it, to the injury of the citizen by the unnecessary commencement of a suit, the unjust accumulation of costs, &c. (1 Chitty's Crim. Law, 276. Hawkins, book 2, ch. 25, § 99. 2 T. R. 581, opinion of Buller, J., and 3 T. R. 98.)

*J. Pierson*, (district attorney of Rensselaer co.) The question now argued was not raised at the trial. Indeed it could not have been heard, as the indictment was originally demurred to for the want of an averment that the notes were bought *with the intent* to be sued, overruled by the over and



terminer, and their decision supported by this court. (6 Cowen, 512.) The questions presented at the trial were, that one note, when purchased, was not due, and that it was taken as a pledge; and that as to the other notes, being for amounts less than \$50, and thus not the subjects of suits on which costs could be made, they were not of that description which attorneys were prohibited from purchasing. [The district attorney here entered into an argument, and cited a number of cases in support thereof, in opposition to the objections raised at the trial; but, as the decision of the court is made upon the principal question raised on the argument here, it is deemed unnecessary to present a view of this part of the argument of the public attorney.]

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As to the necessity of the averment and proof of the *intent* with which the purchase was made. The statute requires no such averment or proof. The act of 1813 did require it, and therefore the act of 1818 was passed. The difficulty of proving the *intent*, induced the legislature to declare the mere act of purchasing a note, &c. by an attorney, except in the cases specified in the proviso, the offence. Can it be, when the legislature have specified the cases in which only it shall be lawful for an attorney to receive a note, &c. that the act may be evaded by an objection that the indictment does not contain an averment which the statute does not render necessary. If such averment be required, the act of 1818 is nugatory, and the law remains as it was under the act of 1813. The indictment, setting forth the offence in the words of the statute and specifying with all possible precision the transaction charged to be a violation of the act, is sufficient.

A. Van Vechten, in reply. To prevent abuses in the practice of the law, is the title of the act under which this prosecution is had. The object of the legislature was, to deter attorneys and counsellors, in the practice of the law, availing themselves of their situation to accumulate costs at the expense of poor and unfortunate debtors, from the purchase of notes, &c. with the *intent* to commence suits thereon. The statute was passed to prevent abuses in the practice of the

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law, as connected with the purchase of notes, procured for the increase of such practice, to the emolument of the attorney, and to the detriment of the citizen, and it imposes the severest penalties on attorneys for doing an act so derogatory to their profession, and so injurious to the public. This is the offence aimed at by the statute. From the mere buying of a note, no abuse in the practice of the law could arise. The buying of a note is not the practice of the law ; for if so, every broker would be a practitioner of the law. The statute was not meant to prohibit a benevolent act, as the paying of a note of a friend and retaining the security ; or an entirely innocent act, as the buying of a note and locking it in a desk until paid ; or a speculation in the public stocks, should an attorney be so fortunate as to have some surplus funds. Stock is a chose in action, and the purchase of it is equally prohibited with the purchase of a note. It is the *malum animum* which the law regards ; it is the *intent* with which the purchase is made which characterises the act. To state in an indictment that an attorney has bought a promissory note, does not shew that he has committed a crime, or violated a statute, unless it be averred that the intent or object of the statute has been violated ; and if the offence consist in the *intent* to violate the object and spirit of the act, such intent must be expressly averred and proved. If a contrary construction is to prevail, every person who has ever been admitted as an attorney or counsellor of this court, although he has retired from the practice of the law for years, is prohibited, under any circumstances, from purchasing a note, &c. although such purchase is entirely disconnected with the practice of the law, to prevent abuses in the practice of which, the statute was passed, and for no other purpose. The second section of the act, which destroys the right to recover on a note bought for prosecution, shews the intention of the legislature, and the *proviso* to the first section, which looks to the intent, corroborates our construction, that it is the intent alone which renders the purchase unlawful.

The act of 1818 is broader in its terms than the act of 1813, and was intended to prevent evasions of the act first passed, but it creates no new offence. The purchase of a note, &c. with the intent to sue, is the evil intended to be remedied by both acts; both relate to the same object, and are therefore in *pari materia*. The principle of the acts of 1813 and 1818 was extended to justices of the peace, by the subsequent statute, passed in 1820. That act clearly expresses, that the evil intended to be remedied, was the purchase with the intent to sue. The oyer and terminer erred in instructing the jury that it was their province to give a construction to the act; it is the duty of a court, and not of a jury, to put a construction upon a statute.

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*By the Court, SAVAGE, Ch. J.* This case came before us heretofore on a demurrer to the indictment. (6 Cowen, 512.) We then considered the indictment good, and it was carried down to the oyer and terminer for trial; the jury have passed on the fact of the purchase of the note, charged in the first count. The question is again presented, whether the indictment charges any offence punishable by law.

The substance of the first section of the act rejecting superfluous verbage is, that no attorney or counsellor shall buy any bond, bill, promissory note, bill of exchange, book debt or other chose in action; nor shall any such attorney or counsellor, directly or indirectly, lend or advance any money to any person as an inducement to the placing in the hands of such attorney or counsellor any debt, demand or chose in action against any other person *for collection*: then follows the penalty and the proviso, which is, that it is not intended to prohibit the receiving in payment by any attorney or counsellor, any bond, &c. for estate, real or personal, or for services actually rendered, or for a debt antecedently contracted, or from buying or receiving any bill of exchange, draft, or other chose in action, for the purpose of remittance, or without any intent to evade or violate this act. As I read the act, it creates two offences; first, the act of purchasing a note by an attorney or counsellor is prohibited; secondly,

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the procuring a note, by loan of money, for the purpose of collection. It is contended that the words *for collection*, in the statute, relate to all which precedes them, and that of course the purchase is not prohibited, unless made *for collection*; but from the manner in which the sentence is framed, it seems to me the words *for collection*, relate only to the member of the sentence in which they are found, and not to the first member; and consequently the first member contains an absolute prohibition, without reference to the intent or object of the purchase. This construction seems to me to be confirmed by the proviso. If no offence was created unless the purchase was made for the purpose of collection, it was surely useless, at least, to state in the proviso that there were four objects for which an attorney or counsel might lawfully purchase a note. If he was at liberty to purchase for any purpose except *for collection*, why specify only four instances in which he was not prohibited from purchasing. The introduction of the proviso proves to my mind, that the legislature supposed that without it, no note could be purchased by an attorney or counsellor for remittance, or received in payment for property sold, or for services rendered, or for an antecedent debt; and of course they must have intended the first paragraph of the first section as a total prohibition.

As long since as 1807, the legislature considered the purchasing of notes *for collection* an evil requiring their interposition; and they then, (sess. 30, ch. 107, sect. 4,) enacted, "That if any attorney of the supreme court, or of any court of common pleas, shall purchase or receive, by way of pledge or security for money lent, any bond, note or other writing with intent to commence a suit thereon, and shall commence such suit accordingly, every such attorney shall be deemed guilty of a misdemeanor." This section was re-enacted in the same words in the seventh section of the act concerning counsellors, attornies and solicitors, in the revision of 1813, (1 R. L. 417;) and so the law remained until 1818, when the statute now under consideration was passed. The object of the legislature undoubtedly was to prevent the officers of courts from purchasing notes, or loaning money upon

them, for the purpose of prosecution. The intent, under the former law, was to be shewn by a suit actually commenced. Probably the legislature was of opinion that in that way they could never strike at the root of the evil. It is certain, however, they intended something different from the former statute, and something more restrictive. Had they intended only to prohibit an attorney from purchasing a note *for collection*, it was very easy to say so. But they evidently, to my mind, intended to relieve the public prosecutor from any trouble in proving *the intent* with which the purchase was made. The purchase is to be of itself evidence of the intent; and the attorney shall be punished severely for the act, unless he disproves the wicked intent, by shewing one of four things, viz. a receiving the note for property sold; for services rendered; for an antecedent debt; or for the purpose of remittance, and without any intent to evade or violate the act; that is, as I understand it, every other mode by which an attorney gets a note into his possession as owner is a violation of the act.

It is contended, if such is the true construction of the act, that it is oppressive and unconstitutional. There is nothing in the constitution to prohibit the legislature from imposing restrictions upon certain classes of citizens. The constitution itself has set the example, by prohibiting certain persons from holding any civil office, as being incompatible with the duties of their professions. The legislature, no doubt, thought it derogatory to the character of an attorney or counsellor to be soliciting or purchasing business, and thereby causing distress in the community by numberless unnecessary prosecutions; and they said, (and properly so, in my judgment,) that no man who is capable of resorting to such expedients shall hold the office of attorney or counsellor in this state. They judged correctly, also, in concluding that to remedy the evil, there must be no difficulty about proving the intent. They no doubt asked, for what purpose does an attorney buy a note, unless for prosecution? and answered by saying, he buys it for no other purpose, unless he brings himself within the exceptions contained in the proviso. They accordingly

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went the whole length of absolute prohibition, except in the specified cases.

I am therefore of opinion that the court of oyer and terminer be advised to render judgment against the defendant upon the conviction.

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THE FRANKLIN FIRE INSURANCE COMPANY VS. T. W. JENKINS  
and three others.

The directors of a monied institution are responsible, in an action on the case, for improperly obtaining and disposing of the funds or property of the company.

They are liable, however, only *individually* and severally, and not jointly as directors, unless the act complained of be done by a *majority* of the board of directors, when by the act of incorporation of the company, a majority only is competent to the transaction of the business of the company.

When a board of directors consists of *sixteen*, a joint action against *four* of the number for an act done *as directors*, cannot be maintained.

A general charge is a declaration, that the defendants, as directors of an insurance company, loaned the funds of the company upon inadequate security, knowing such security to be insufficient, without any specification of time, persons or circumstances is insufficient; and a demurrer for this cause will be sustained.

The declaration will also be adjudged bad, if the grievances complained of are alleged to have been committed in part by the want of care and attention, and in part by the corrupt and wilful mismanagement of the defendants.

*It seems*, that in a declaration, charging directors with having squandered the funds of a monied institution, it should be averred of what the funds, credits and effects of the company consisted.

ment of the said funds, credits and effects of the plaintiffs, and to invest the same in such manner and in such securities as they should deem most conducive to the welfare of the plaintiffs and the owners and proprietors of the capital stock of the plaintiffs as such body corporate and politic; yet the said defendants, severally, totally disregarding their said duty, and contriving, and fraudulently and willfully intending to injure the plaintiffs while they, the said defendants, severally, were and acted as such directors as aforesaid, and had the care, custody and control of the said funds, credits and effects, to wit, on the day and year aforesaid, and on divers subsequent days and times, to wit, at, &c. took so little and such bad care in and about the preservation and safe investment of the said funds, credits and effects of the said plaintiffs, that by and through the carelessness, negligence, and corrupt and wilful mismanagement of the said defendants, as such directors, in loaning the said monies, credits and effects upon securities which they at the time well knew to be insufficient and inadequate for that purpose, the said funds, credits and effects then and there became and were greatly wasted, impaired, dissipated, and finally lost to the said plaintiffs, to wit, on, &c. at, &c. The *second* count is substantially the same as the first, with the exception that in addition to charging the defendants with fraudulent and wilful misconduct, they are charged with having acted corruptly, and with a view to their private benefit and advantage; and that there is no specification of the manner in which the funds of the plaintiffs were wasted and lost.

The defendants demurred, and for causes of demurrer assigned the following: 1. That a *joint* action cannot be sustained, the grievances complained of being alleged to have been committed by the defendants *severally*; 2. That it is not alleged of what the funds, credits and effects of the plaintiffs consisted, of which the defendants are charged to have had the care, custody and control; 3 That it is not alleged *how*, or in what manner the funds became wasted and lost; and 4. That the grievances complained of are alleged to have been committed in part by the want of care, and in part by

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corrupt and wilful mismanagement, which is double, repugnant, &c. The plaintiffs joined in demurrer.

*W. Slosson*, in support of the demurrer. There is no averment that any funds came to the hands of the defendants. The declaration sets forth no special matter from which the duty would arise, with the neglect of which the defendants are charged. It is not enough to allege that the defendants were directors of the company; every fact requisite to enable the court to judge whether there has been a breach of duty ought to have been specially stated. (12 East, 89. 1 Wils. 281. 17 Johns. R. 439.) The act incorporating this company, (Statutes, 4 vol. c. 34.) requires that the stock, property, affairs and concerns thereof, shall be managed and conducted by *sixteen* directors; that a major part of them shall constitute a board, and be competent to the transaction of business; and all questions shall be decided by a majority of voices, (s. 4 and 8.) A corporation must act according to its constitution. (2 Johns. R. 109.) The statute confers no power, and consequently imposes no duty upon individual directors, or upon any number less than a majority.

An action does not lie against individuals for acts erroneously done by them in a corporate capacity, from which detriment happens to the plaintiffs, unless done maliciously or corruptly. (1 East, 555.) They are not liable for mistake, error of judgment, or negligence. The general allegation of corrupt and wilful mismanagement is not enough; the particular acts upon which the charge is founded should be stated, so as to enable the defendants to come prepared to answer. (1 Chitty's Pl. 255.)

The declaration is defective also, as in its distinct causes of action, and against several persons, are set forth. Unless it was averred that there was a joint duty upon the four defendants sued, although they may have acted together, their acts are individual, for which they are separately responsible. The plaintiffs state that the defendants *severally* disregarding their duty, &c.; how then can they be made jointly answerable?



*G. Griffin*, for plaintiffs, admitted that the defendants are not liable for mistake, error of judgment, or even negligence; but insisted that they are responsible for wilful and corrupt conduct in their office of directors, the holding of which the court judicially knows devolved duties upon them, which therefore need not be particularly enumerated in the declaration. The rule of *certainty* in pleading is qualified by two general exceptions; first, where the knowledge of the facts is *peculiarly* in the opposite party; and secondly, where a subject comprehends multiplicity of matter: there, to avoid prolixity, the law allows general pleading. (1 Chitty's Pl. 239, 240. 13 East, 112. Comyn's Dig. Pleader, C. 42, E. 26.) Courts modify the rules of pleading to accommodate them to the purposes of justice, as in actions against bailees, common carriers, inn-keepers and owners of ships. The *quo modo* the injury is done, need not be stated.

All torts are in their nature, joint and several; and all participating in them are liable to be sued. There was no necessity of joining all the directors. The charge is, that those four defendants squandered the funds, and acted jointly in so doing. Unless the evidence supports the charge, the plaintiffs do not expect to succeed.

*Slosson*, in reply. In an action against a common carrier, &c. the duty of the defendant is known; a general charge is sufficient, and it is left to him to discharge himself. Not so with the duties of directors of an insurance company; they are unknown to the court, and must therefore be specially averred. If the defendants acted jointly by virtue of a resolution of the board of directors, the averment ought to have been made, and the defendants should have been charged as agents of the board, not as directors of the institution. It is admitted that the circumstances of each transaction complained of need not be stated; but the fact, such as a particular investment, &c. by which it is alleged the loss happened, should be averred.

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*By the Court, SUTHERLAND, J.* The demurrer is well taken. The defendants, if liable at all upon the allegations contained in the declaration, are liable *individually* and severally, and *not jointly*, as directors. By the act of incorporation, (Statutes, vol. 4. c. 34,) the concerns of the company are to be managed by sixteen directors, and a major part is necessary to constitute a board, and to be competent to the transaction of the business of the corporation. The four defendants therefore were incapable of doing any corporate act, and could not jointly as directors have wasted and lost the monies, credits and effects of the plaintiffs, by their carelessness, negligence, and corrupt and wilful mismanagement, in loaning the monies, &c. upon security, which they well knew to be inadequate and insufficient. The act of incorporation imposes no duties on the directors simply as *individuals*, but on a *majority* acting as a board. If any one or more of the directors improperly obtain and dispose of the funds or property of the company, they are undoubtedly responsible; but responsible respectively, as individuals, and not jointly as directors.

The plaintiffs were bound to state with more particularity the acts of misconduct complained of. The first count of the declaration avers in general terms, that through the carelessness, negligence, corrupt and wilful mismanagement of the defendants, as directors, in loaning the monies, credits and effects of the company, upon securities which they at the time knew to be insufficient, the said funds were wasted, impaired and finally lost to the plaintiffs. The gist of this charge is, that the defendants, as directors, loaned the funds of the company upon inadequate securities, knowing them to be inadequate, without any specification of time, persons or circumstances. It is impossible for the defendants to traverse the charge, or to enter on their defence with safety, without being prepared with testimony in relation to every loan in the making of which they may have participated. The plaintiff is bound to allege all the circumstances necessary for the support of this action, with such precision, certainty and clearness, that the defendant may know what he is called upon to answer, and be able to plead a direct and unequivocal plea. (1 Chitty's Pl. 255.) The decla-

ration in this respect is entirely defective. In actions against common carriers, inn-keepers and bailees, a very general form of declaring is allowed; but the particular goods or articles lost are always set out in the declaration, and their delivery to the carrier or inn-keeper is averred; and from such delivery their liability arises, if the goods are lost or destroyed, (2 Chitty's Pl. 271 to 276, and notes,) unless they shew the loss to have arisen from the enemies of the state or the act of God. (1 T. R. 33. 7 Cowen, 500, note.) Here it is not alleged in either of the counts what the funds, credits and effects of the plaintiffs were, of which the defendants had the care and control; and in the second count there is no sort of specification of the want of care or negligence, or of the corrupt and wilful mismanagement by which the funds were impaired or lost by the defendants. Both the counts also contain two distinct charges, requiring separate and different answers, and leading to different issues. The grievances complained of, are alleged to have been committed in part by *the want of care and attention*, and also by *the corrupt and wilful mismanagement* of the defendants. These are very different allegations, and require distinct and different answers. On these grounds, the declaration appears to me to be bad.

Judgment for defendants on demurrer, with leave to plaintiffs to amend.

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#### DEPUY vs. SWART.

THIS was an action of assumpsit, tried at the Ulster circuit, in April, 1828, before the Hon. JAMES EMOTT, one of the circuit judges.

*to bearer*, by a person to whom the same has been transferred, where the maker has obtained a discharge from all his debts as an insolvent debtor, previous to the transfer; although after the discharge, but before the transfer, the maker makes a *new promise* to the *payee* to pay the debt, and such new promise is set up by way of replication to the plea of discharge.

An insolvent's discharge under the act exonerating a debtor from the payment of his debts, *discharges the debt* for which a note is given; the note becomes *functus officio*, loses its negotiable qualities, and a person to whom it is transferred after such discharge, acquires no right to maintain an action upon it.

A promise to pay a debt discharged under such insolvent law is a *new contract*. A suit on such contract can be brought only in the name of the person with whom the contract is made; and a note, the evidence of the original debt, has no connection with such suit, other than as furnishing a consideration for the new promise.

In declaring in an action brought after such new contract, the plaintiff may set forth the original cause of action, and in his replication aver the new promise.

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An action cannot be maintained against the maker of a promissory note payable

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The declaration was by the plaintiff as *bearer* of a promissory note made by the defendant, payable to Abraham Robison or bearer, for the sum of \$313,50, dated August 8, 1823. The defendant pleaded a discharge obtained by him as an insolvent debtor on the 12th February, 1824, under the act granting relief in cases of insolvency, discharging him from all debts due from him at the time of his assignment, or contracted for before that time, though payable afterwards. A stipulation was entered into between the parties, that the cause should be tried as if a replication of a new promise had been interposed and an issue joined thereon reserving to each party the right of availing himself of the law arising upon the whole case, and agreeing that the defendant might raise the question whether, if judgment passed against him, his body ought not to be exempted from imprisonment.

On the trial of the cause, the making of the note was admitted, and the discharge produced. The payee of the note (after being released by the plaintiff) proved the transfer of the same about a year before the trial, and testified that shortly after the defendant obtained his discharge, and repeatedly since, while he (the witness) was the holder of the note, and previous to the transfer to the plaintiff, the defendant promised to pay the debt. This evidence was objected to by the defendant, but received by the judge, who directed the jury to find a verdict for the plaintiff. The defendant asked that the verdict might be special, so that a judgment might be entered exempting his body from execution; which application was denied by the judge, and a general verdict was found for the plaintiff to the amount of the note. This cause come on to be heard on a case containing the above facts and the stipulation above referred to.

*Romeyn*, for defendant. The discharge of the defendant dissolved the original contract and extinguished the pre-existing debt; and in this respect, the plea of an insolvent discharge differs from that of infancy and the statute of limitations. In 14 Johns. R. 178, and 15 id. 519, these defences were considered analagous, although there was no direct adjudication upon the point. The cases of infancy and the stat-

ute of limitations are placed upon the same ground, and said to be a suspension of the remedy only ; but there is a distinction as to the plea of discharge of an insolvent debtor. In *Sturges v. Crowningshield*, (4 Wheaton's R. 122,) it is said the discharge impairs the obligation of the contract, while the statute of limitations relates only to the remedy. This decision is recognized by this court as the law of the land, in 16 Johns. R. 252, 17 id. 108, and 19 id. 153. Chancellor Kent also recognized the distinction. He said, "The discharge under this act *releases* the debt, while the other (the statute of limitations) only raises a presumption of payment." (7 Johns. Ch. R. 297.) And in 17 Johns. R. 46, Ch. J. Spencer, speaking of the effect of a discharge, says, "The debtor is *absolved* by the discharge." Under this view of the subject, it is supposed that the case of *Baker v. Wheaton*, (5 Mass. R. 509,) is a decisive authority. Parsons, Ch. J. says, in reference to the insolvent laws of Rhode-Island, which are the same in effect with the insolvent act of this state, "By the operation of those laws, the contract no longer exists, and a subsequent endorsement of the note is void. A note *functus officio* cannot be negotiated ;" and he likens it to the case of an absolute payment.

If such be the operation of a discharge, a *new promise* to pay the debt does not restore the original negotiable properties of the note ; because such new promise is a *new contract*, giving a new cause of action, and is not negotiable. It may be assigned, but can be recovered only as an ordinary chose in action, in the name of the assignor. (1 Chitty's Pl. 43. Bac. Abr. App. vol. 6, p. 187, tit. Bankrupt. 8 Taunt. 563.) Being a new promise, it must be clearly and unequivocally made, (2 Starkie's R. 296 ; ) if conditional, the condition must be complied with. (7 Johns. R. 36.) It is, in no respect, a continuation of the former indebtedness, but a new contract springing out of, and having the original indebtedness for its consideration. (1 Peters' R. 351.) Had the promise been made to the plaintiff, he could have recovered only by declaring specially. (6 Cowen, 157.) Nor is the plaintiff's case strengthened by the principle, that in a case of this kind, a party may declare on the original cause of action, because

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it affects not the question in whose name the suit shall be. As to this mode of declaring, although it seems to be settled, it does not appear to be fully acquiesced in. Mr. Wheaton, (Wheat. Selw. 44.) observe, "In cases of this kind, many eminent pleaders not only declare for the original cause of action, but they also insert a count on the subsequent promise."

*C. Ruggles*, for plaintiff. The principle of the English cases on this subject, recognized by this court in the case of *Shippey v. Henderson*, (14 Johns. R. 178,) is, that the new promise is a waiver of the defendant's discharge, and re-instates the parties in the situation in which they stood previous to the discharge. By the discharge, the note in this case was, to a degree, *functus officio*; but the party certainly had a right to revive it. He might have given a new note, and the promise here, founded upon the moral obligation, is equivalent to a new note. A holder of a note may avail himself of a promise to another to pay, although, without such promise, the action could not be maintained. (13 East, 417.)

*By the Court*, MARCY, J. It is to be regretted a stipulation was substituted for a part of the pleadings in this case. It is somewhat uncertain what would have been the issue. The plaintiff declares on a promissory note transferred to him by the payee. The defendant interposes a discharge under the insolvent law of 1813. Here the pleadings stop, and a stipulation is entered into to try the cause on the fact of a new promise with leave to each party to avail himself of the law arising on the whole case. We are thus left to conjecture what the replication would have been. If it had stated a promise to pay, made to the plaintiff subsequent to the discharge, he must have failed on the trial, because it is not pretended that such a promise was ever in fact made. An averment of a promise to the present holder of the note, would not have been sustained by proof of a promise to a former holder. It appears to me there would have been some difficulty in pleading a promise made to the witness Robinson subsequent to the discharge, so as to have it enure to the benefit of the plaintiff and be the basis of his action.

It is insisted on the part of the plaintiff, that a promise to pay, made to the holder of the note, not only revives the debt, but restores the note with all its negotiable properties. The language of the cases which speak of the effect of an insolvent or bankrupt's discharge upon his existing debts is not very precise or uniform. In some cases, the effect has been considered the same as that of the statute of limitations on debts to which it applies. In other, and in most of the cases, the statute has been considered as affecting the remedy only, while a discharge has been adjudged to reach the cause of action. Without stopping to inquire whether this distinction rests upon a clear difference in the two cases, I shall endeavour to ascertain what is the true effect of a discharge upon the debts due by the insolvent. The act for giving relief in cases of insolvency, (1 R. L. 460,) declares, that upon the petitioner's complying with its provisions, the officer executing it shall *discharge* him from all debts, &c. The language of the act, in its fair signification, extends beyond the mere proceedings for enforcing the right, to the right itself; and such, in most cases has been its construction. In the case of *Sturges v. Crowningshield*, and in several others before the supreme court of the United States, it has been considered that insolvent discharges reach to the contract itself, and impair its obligation; and that in that respect, the laws authorizing these discharges differ from the statute of limitations and enactments concerning usury, which only relate to the remedy. The bare acknowledgement of a debt, barred by the statute of limitations, is held to revive it; but an acknowledgement of a debt from which the defendant has been discharged, be it ever so explicit, gives no cause of action. In the latter case, nothing but a precise and positive new promise will be sufficient to sustain a suit: it was so held in *Lynbury v. Wrightman*, (5 Esp. R. 198.) In a note to this case, it is said bankrupts and infants, with respect to debts from which they are discharged, stand on different ground from persons whose debts are barred by the statute of limitations, as that statute does not discharge the debt, but only takes away the remedy by action. Even the acknowl-

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edgment or promise, which does away the effect of the statute of limitations, is not deemed a continuation of the original promise, but is a new contract. This, Judge Story thinks is settled both upon principle and authority, (1 Peters, 371 ;) *a fortiori*, is the promise to pay a debt discharged under an insolvent law a new contract. In the case of *Roberts v. Morgan*, (2 Esp. R. 736,) Eyre, Ch. J. says, a debt barred by a certificate under a commission of bankruptcy, by a new promise to pay it, becomes a *new debt*. Lord Mansfield also says, where there has been a new promise after the discharge, the bankrupt is liable as on a *new contract*. (Douglass, 192.) The moral obligation uniting to the new promise makes what he calls, in the case of *Truman v. Fenton*, (Cowp. 544,) "*a new undertaking and agreement*." What conclusively shews that the new promise creates a new contract is, that if the promise be special or conditional, the plaintiff has his remedy upon it pursuant to the condition or the special circumstances of the engagement. (2 H. Black. 116.) These authorities clearly shew that the new promise is the contract upon which the action against the defendant must rest. The old debt has no further connection with the suit than what arises from the circumstance that it is resorted to for the purpose of furnishing a consideration for the promise, by reason of its moral obligation, after its legal obligation is destroyed by the discharge. The liability, therefore, of the defendant, is on the new contract; and upon principle, the suit should be in the name of him with whom such contract is made.

The discharge of the defendant discharged the debt for which the note was given; and the transfer of it, if there had been no new promise, would have been void. The position is supported by an express decision in the case of *Baker v. Wheaton*, (5 Mass. R. 509.) In such a case, the note is *functus officio*, and can have no negotiable qualities, because it has no legal existence. It is regarded by the court in that case, in the same light, as a note discharged by payment. What is the effect of the new promise upon the note? If it does not, and it is clearly settled that it does not, renew the old contract, how does it operate to renovate the note given



on that contract? The note has a valid existence from its execution; and after this existence is destroyed, as it is, according to the case from Massachusetts, and the debt for which it is given discharged according to all the cases, can it be revived and restored to all its former properties by the maker's entering into a new contract, by which he becomes liable to pay what was due on the old contract? Correct reasoning would not establish such a result, and nothing but the mode of pleading which has been sanctioned in such cases has given any sort of countenance to the notion.

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It is well established, that the plaintiff may declare on the original cause of action. The inconsistency of making the new promise the basis of the action, and at the same time allowing the plaintiff to declare upon the antecedent debt, which has been discharged or the remedy upon it barred, has been often presented to the courts of England and this country; and although it has been sanctioned, it has been looked upon as a deviation from the general rule requiring a plaintiff to state in his declaration the agreement or whole cause of action whereon his suit is brought. In all the cases however that I have found, the original debt was due to the same person to whom the new promise was made; and the mode of pleading sanctioned by the courts in such cases is extremely well fitted to present the issue upon the new contract. The replication setting up this contract has not been considered a departure, because it is not entirely a new matter; it derives that which is necessary to support its consideration from the old debt. The issue is, in fact, upon the new contract, and the note given on the old contract is only brought into view as furnishing the consideration which the plaintiff must shew for the new promise. The note, in my opinion has no valid existence for any other purpose; and the plaintiff did not acquire from the transfer of it to him any right to maintain this action. According to the stipulation between the parties, judgment is given for the defendant.

Judgment for defendant.

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Where there has been a *division fence* between the owners of adjoining lands, and one of them, after giving due notice of his intention to throw up his lands for *common feeding*, or to let them lay open, removes his part of the fence, and his cattle enter upon the lands of his neighbor, the owner of such cattle is liable to an action of *trespass* at the suit of his neighbor, notwithstanding that the fence was not removed until after the time specified in the statute.

THIS was an action of trespass, tried at the Schenectady circuit, in September, 1827, before the Hon. WILLIAM A. DUER, one of the circuit judges. The declaration was in *trespass quare clausum fregit* and *de bonis asportatis*. The defendant pleaded the general issue, and gave notice of special matter intended to be given in evidence.

The parties were owners of adjoining lands, between which there was a division fence, extending on a line north and south. By agreement between the parties, the *south* half of the fence had been maintained by the plaintiff, and the *north* half by the defendant. On the 24th March, 1826, the defendant gave notice to the plaintiff that he intended to throw up his lands, adjoining the plaintiff, for common feeding, or to let the same lay open, and purposed to remove his part of the division fence. On the 18th July, 1826, the defendant, in pursuance of such notice, took down and removed a portion of his part of the division fence, and through the opening thus made, the cattle of the defendant entered upon the lands of the plaintiff, and did injury to his crops of corn and

A notice of an intention to throw up lands, or to let them lay open, may be by *parol*.

A party who has received such notice, cannot object that other persons in possession of adjoining lands have not received a similar notice.

The only effect of throwing up land, or permitting it to lay open, is to remit the parties to their common law rights and duties, which are: that a tenant of a close is not obliged to fence against an adjoining close, and without such fence may bring trespass for an entry of cattle; the owner of the cattle being obliged to keep them on his own premises, in the absence of an agreement or prescription about fences.

Where cattle are *rightfully* feeding upon *commons*, either such as belong to the town or such as are thrown up to *common feeding*, under the *seventeenth* section of the act, the owner of crops is bound to make fences against such cattle, or he cannot maintain trespass.

Cattle can be thus *rightfully* feeding, only in pursuance of a regulation adopted in town-meeting.

Whether that part of the *seventeenth* section which speaks of throwing up land to common feeding, does not relate only to such towns as have *common lands* in their corporate capacity? *Quere*.

It seems that the *twelfth* section of the act relative to the duties and privileges of towns authorising prudential rules and regulations respecting the permitting or preventing cattle to go at large, has reference to such towns only as have *common lands*, the property of the town in its corporate capacity; and that a town having no *common lands* in its corporate capacity, has not the power to pass such regulations, the public not having the right to depasture *highways*.

A witness on his examination, may recur to a written memorandum to refresh his memory as to facts to which he is called to testify.

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oats there growing. The lands of the defendant adjoining the plaintiff were bounded on a highway, and other cattle besides those of the defendant entered upon the lands of the plaintiff. In addition to these facts it appeared on the trial, that the servants of the defendant drove his cattle into the field adjoining the plaintiff's lands, after they had been driven from the plaintiff's lands into the public highway; and that at a certain time, when the plaintiff and his servants attempted to drive the defendant's cattle from off the land, they were prevented by the defendant, who, besides using very abusive and threatening language towards the plaintiff drove the cattle into a field of the plaintiff. It was also proved that the defendant said he had prepared a notice for other persons of his intention to lay open his lands, but did not mean to serve it, as he did not wish to injure any one besides the plaintiff. The damages of the plaintiff were proved to the amount of \$20, and that the cost of a stone wall, built to replace the fence which was removed, was about \$26.

It was objected on the trial that the notice given by the defendant of his intention of letting his lands lie open, should have been *in writing*. The judge decided that a notice by *parol* was sufficient, but that it ought to have been given to all the persons in possession of adjoining lands. To this opinion the defendant excepted. There was an exception also taken to another decision of the learned judge: a witness of the plaintiff being asked to state the days and times when he had seen the cattle of the defendant upon the premises of the plaintiff, answered, that he could not do so without reference to a memorandum in writing made by him at that time, and now in his possession. Such reference was objected to by the defendant, but the judge decided that it was competent for the witness to refer to the memorandum for the purpose of refreshing his recollection.

The judge charged the jury that the only question before them was the amount of damages; that the defence set up had been adjudged by the court insufficient; but that, had it not been so adjudged, there was no excuse for the defendant's causing his cattle to be driven upon the lands of the plaintiff, and for entering upon the lands himself, and by vic-

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lence preventing the plaintiff from turning away the cattle ; that the jury were bound by their verdict to give the amount of damages actually proved, and were at liberty to add, by way of smart money, such sum as would indemnify the plaintiff, and teach the defendant a wholesome lesson, if, from the circumstances, they were satisfied that the trespass was wilful and malicious. The jury found a verdict for the plaintiff, with \$75 damages. A motion was now made to set aside the verdict, and that a new trial be granted.

*H. P. Hunt*, for defendant. The defendant having given the notice required by the statute of his intention to let his lands lay open, was not chargeable as a trespasser for the escape of his cattle from his own premises. The plaintiff having received notice himself, had no right to complain that notice was not given to all the persons in possession of adjoining lands ; and the judge therefore erred in instructing the jury that the defendant was not entitled to the benefit of the defence he had set up. The charge of the judge was also calculated to mislead the jury as to the amount of damages, in omitting to instruct them that the plaintiff had no claim for the rails taken away, and for building the stone wall. He cited 2 R. L. 133, § 17 : 1 Cowen, 78, n. ; 6 Mass. R. 98, 99 ; 9 Johns. R. 136 ; 12 id. 433.

*M. T. Reynolds*, for plaintiff. The only effect of a notice in such cases is, to excuse a party from liability for the repair of a fence formerly maintained by him, and from the payment of damages which may be sustained by his neighbor in consequence of its removal ; it does not justify a trespass. The defendant was bound to keep his cattle upon his own land, and to see they did not enter upon the land of the plaintiff. At the expiration of three months from the time of notice, the parties were in the same situation as if a division fence had never been made between their lands, and each was bound to restrain his own cattle to his own premises. Neither the common law or statute requires that a landholder shall fence against his neighbor. (19 Johns. R. 385. 1 Cowen, 78.) No objection can now be urged against the charge of the judge, none having been made at the trial. Besides, the judge

was not desired by the party to charge upon the points now presented. The verdict was well warranted by the testimony.

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*By the Court*, SAVAGE, Ch. J. In order to have a clear understanding of the existing rights of the parties, it will be useful to enquire what were their relative rights and duties at common law, and what alterations are made by the statute.

"At common law," says Ch. Justice Parsons, in *Rust v. Low*, (6 Mass. R. 94,) "the tenant of a close was not obliged to fence against an adjoining close, unless by force of prescription; but he was at his peril to keep his cattle on his own close, and to prevent them from escaping; and if they escaped, they might be taken on whatever land they might be found *damage feasant*, or the owner was liable to an action of trespass by the party injured." "Every unwarrantable entry on another's land is a trespass, whether the land be enclosed or not. A person is equally answerable for the trespass of his cattle as of himself." (*Wells v. Howell*, 19 Johns. R. 385. 3 Black. Comm. 209, 211.) "Every person, then, may distrain cattle doing damage on his close, or maintain trespass against the owner of the cattle unless the owner can protect himself by the provisions of the statute, or by a written agreement, to which the parties to the suit are parties or privies, or by prescription." (6 Mass. R. 97.)

Where there was no agreement or prescription, there was no mode by which one tenant could compel the tenant of an adjoining close to make division fences; and even where there was such agreement or prescription, the remedy was by action upon such agreement or prescription. Our statute (*relative to the duties and privileges of towns*, 2 R. L. 133, § 17,) however, has altered the rights of the parties. Where the lands of two persons join, each shall make a just proportion of the division fence, unless they agree to let their lands lie open. If any person shall neglect to make or keep in repair his proportion of such fence, he shall be liable to such damages as shall accrue by reason of his negligence; and if he omit to make or repair his proportion of the fence for one month after notice and request, then the party injured may make or repair the fence at the expense of the party so neg-

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lecting to do it. And in case any person who shall have made his proportion of the fence, shall be disposed to throw up his lands for common feeding, or to let the same lay open, he shall give three months notice to the person or persons in possession of the lands adjoining; and if the fence shall be removed before the expiration of three months, the person removing it shall pay all damages sustained by such removal.

Under this statute, it has been decided that where hogs entered a corn field through the plaintiff's own fence, the same being insufficient, the plaintiff could not recover; but had they entered through the defendant's fence, the plaintiff would have recovered. (12 Johns. R. 433.) And the case of *Wells v. Howell*, (19 Johns. R. 385,) decides that as against a highway, where cattle have no right to run, no fence at all is necessary, to enable the plaintiff to maintain trespass. In the application of these principles to this case, how are the parties affected? Had the statute never been passed, the defendant must have kept his cattle in his own premises in the absence of all agreement or prescription about fences. The plaintiff, without any fence, could bring trespass for the injury he has sustained. Had the fence remained under the statute regulation, it being the fence of the defendant, and had the same injury been inflicted, the plaintiff would have sustained trespass. Is the defendant, by throwing up his land to common feeding, or to lay open, in a better, or the plaintiff in a worse situation, than at common law? Into what is the defendant's field converted by removing the partition fence? Is it a common highway? or does it become the common lands of the town? or does it remain the property of the defendant, for any trespass upon which he may maintain an action? If it became *common lands*, the defendant's cattle were wrongfully there without a bye-law of the town permitting cattle to run at large. So, too, if it became a highway: and if the character of the field was not altered, the utmost effect of the defendant's withdrawing his fence under the statute would be to remit the parties to their common law rights and duties. The statute was intended for the convenience and accomodation of all concerned; not to enable one man to destroy his neighbor's crops under cover of the law.

By the twelfth section of the act, towns have a right to make such prudential rules as they think proper for improving their common lands in tillage and pasturage, or any other way, and for permitting or preventing cattle, &c. to go at large, and for directing the time and manner of using their common lands. This section undoubtedly has reference to such towns only as have common lands, the *property* of the town in its corporate capacity ; and it may well be doubted whether the seventeenth section does not also relate to such towns only as have commons, when it speaks of throwing up land to common feeding, or to let the same lay open.

Suppose a case where the town has no common land, and they pass a bye-law permitting cattle to run at large, where are they to run ? Surely not on individual property. Where then ? in the highway ? The public have simply a right of passage over the highway ; they have no right to depasture the highway. The owner of the lands through which the highway runs is the owner of the soil, and of the timber, except what is necessary to make bridges, or otherwise and in making the highway passable. (15 Johns. R. 453 ;) and if the owner of the soil owns the timber, why not the grass ? This question has never been distinctly raised in this court, and some intimations have been given, from which it might be inferred that towns have a right to permit cattle to run at large in the highways ; but in *Stackpoole v. Healy*, (16 Mass. R. 33,) the question has undergone a very full consideration and discussion, and the supreme court of Massachusetts have decided that the public have no such right in highways. The statute in that state is in stronger terms than ours ; but it was holden to relate to *common lands* only, and not to highways. It is not necessary now to decide that point, because no regulation of the town is shewn permitting cattle to go at large. If the defendant's cattle were in the highway or a common, they were there unlawfully, without authority from the town ; and it is certainly well settled, that a man is not obliged to fence against any cattle but such as may be rightfully on the adjoining close. (6 Mass. R. 99. 16 id. 38. 2 H. Black. 527. 19 Johns. R. 385.) In towns where there are common lands, or where the town has authority to direct

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the times and manner of using such lands, if a party chooses to throw up his fields to common feeding, and cattle are rightfully feeding upon commons, either such as belong to the town, or such as are thrown up to common feeding under this section, the owner of crops must undoubtedly make fences against such cattle so lawfully grazing; and to such cases only, I apprehend, is this provision of the statute applicable.

Some minor questions were raised which require a decision.

On the part of the defendant it was objected, that the testimony of one of the witnesses was improperly admitted, because he referred to a memorandum to refresh his memory. This is always permitted and is unobjectionable.

It was also objected, that the notice given by the defendant should have been in writing. It is a sufficient answer to say, that the statute does not require that it should be in writing. The judge however, decided the notice was defective, because it was given to the plaintiff only, and not to the other owners of the adjacent lands. It is true that the statute requires notice to be given to the person or persons in possession of the lands or meadows adjoining; but it seems to me that the plaintiff cannot object to the want of notice to others, since it was given to him, particularly as no fence was removed, but that between the land of the plaintiff and the defendant. But if the judge erred in this particular, the defendant is not prejudiced by the decision, *if I am correct* in the view I have taken of this case.

There is another view of the case, which is sufficient to sustain the verdict, *even if I am in error* as to the law as above laid down. It is this: that the defendant not only took away his fence with the declared intention to injure the plaintiff, but, lest his cattle should not destroy the plaintiff's crops voluntarily, his wife and son drove them from the highway into the field, near the plaintiff's crops; and when they were actually committing the work of destruction, the de-



defendant himself, not only did not turn them out, but by threats prevented others from driving them out of the plaintiff's fields. On the whole, the verdict seems to be lawful, and it certainly is just.

Motion for new trial denied.

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DOE, ex dem. MARSTON and others. vs. BUTLER.

THIS was an action of ejectment, tried at the New-York circuit, in March, 1828, before the Hon. OGDEN EDWARDS, one of the circuit judges.

The premises in question were claimed by the lessors of the plaintiff under a deed conveying the same with other lands, executed by Nicholas Bayard to Thomas Marston and six others, as *joint tenants*, bearing date 20th December, 1771, duly acknowledged and recorded. The consideration expressed in the deed was £10,000. Thomas Marston survived his co-grantees, and died himself in the beginning of the year 1814. He had four daughters, all of whom married and died during the life time of their father, leaving children.

The declaration contained four demises: the *first*, from Thomas Marston, laid on the 1st January, 1813; the *second* a *joint demise* from the heirs of Thomas Marston, laid on the 28th February, 1826; the *third*, also a *joint demise* from the same persons, laid on the 1st January, 1820; and the *fourth*, from one Lawrence Reid Stevens. The descent of the per-

A conveyance in fee having been shewn from the original proprietor of a tract of land, the grantees will be presumed to have entered into possession; and whoever is in possession will be presumed to hold for them, and in subordination to their title, until the contrary appears. So ruled, in a case where the claim to recover was made under a conveyance executed 55 years before suit brought.

A surrender or re-conveyance to the grantor cannot be presumed, even after a lapse of 55 years, where no foundation for such presumption is laid, by shewing title or claim of right under the grantor, either in the tenant or those from whom he derived his possession.

A presumption of re-conveyance will be made, where it is necessary to clothe a rightful possession with a legal title; but the court must first see that there is nothing but the form of a conveyance wanting. But this presumption in favor of a grant, against written evidence of title, can never arise from the mere neglect of the owner to assert his right, where there has been no adverse title or enjoyment by those in whose favor the grant is to be presumed.

A demise in a declaration of ejectment laid from a man who was dead at the commencement of the suit, may be objected at the trial and is cause of nonsuit. A lessor must be capable of making a demise, not only at the time alleged in the declaration, but also when the suit is commenced.

Where a *joint demise* is laid in the names of several lessors, it must be proved as laid; and unless it be shown that the lessors had such an interest as would enable him to join in a demise, the plaintiff will be nonsuited.

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sons alleged to be the heirs of Thomas Marston, and named as the lessors of the plaintiff in the *second* and *third* demises, was regularly proved, except that the name of one of them was inserted in the demise Celia, instead of Elsie or Alice, and that the marriage of another, viz. Cornelia Dennis, with John D. Martin, named as lessors, was not proved.

The premises sought to be recovered were part of a farm whereof Nicholas Bayard was in possession, previous to his conveyance of the same in 1771, and whereof he continued in possession until his death in 1798; admitting, however, the claims of those who had deeds from his grantees of portions of the farm under the conveyance of 1771. The premises were sold by the corporation of New-York, in 1813, for the term of six years, to satisfy an assessment due the corporation.

On this evidence, the judge ruled that the plaintiff was not entitled to recover, and directed a nonsuit to be entered. The plaintiff excepted, and now moved to set aside the nonsuit.

*J. I. Roosevelt jun*, for plaintiff. The fact that Marston, the lessor of the plaintiff in the first demise died previous to the commencement of the suit, was no cause for nonsuiting the plaintiff. The demise was laid in 1813, and he did not die, until 1814. The enquiry is not whether the lessee be living or dead, but whether he had title at the date of the demise. By the consent rule, the defendant agreed to admit the demise, and to contest the title alone. The death of a lessor does not abate the action, (8 Johns. R. 495,) and is no excuse for not going to trial. (1 Wendell, 27.) The defendant, to have got rid of this demise, should have moved the court to have had it struck out. (3 Johns. R. 259.)

The plaintiff was entitled to recover under the second count. Title was shewn in five lessors; as to the sixth, there was a mistake in the name. The jury should have been permitted to pass upon the case, so as to have given the plaintiff an opportunity to move to amend. Besides, shewing title in five lessors, supported the plaintiff's claim to five-sixths. The only ground alleged for a nonsuit as to this count was, that the proof did not support the declaration. Tenants in common may make a *joint* demise in ejectment, (2 Caines,

109.) or *separate* demises may be laid in the name of each ; and they will recover the whole of the premises, if they can shew title. (12 Johns. 185.) Why, then, should not a recovery be permitted in the names of those in whom title is shewn ? Can the joining of a party, who has no title, avoid the lease as to those who had title ?

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*W. Slosson*, for defendant, did not deny the doctrine, that the death of a lessor during the pendency of a suit, will not abate the suit ; but he contended that a plaintiff in ejectment had not the right to insert in his declaration a demise in the name of a *dead man*. Although the action of ejectment is said to be a fiction, the fiction must be such as that it may be true. The lessor must have title, as well at the commencement of the suit, as on the day of the demise. At the commencement of this suit, the lessor had been dead several years. The defendant might have applied to have had the demise stricken out ; but it is to be presumed he did not know the fact until it was disclosed on the trial, and he might then make his objection.

He also admitted that here tenants in common may make a *joint* demise in ejectment, though it is held otherwise in England. But a *joint demise* having been laid, a *joint title* must be proved, or the plaintiff must fail. There was a defect of proof as to two of the lessors ; the name of one was erroneously stated ; the marriage of the other was not shewn, authorising the use of the name of her husband as a lessor.

The plaintiff was properly nonsuited also, because a valid subsisting title was not shewn in the lessors of the plaintiff at the commencement of the suit. The plaintiff was bound to shew a *prima facie* right of entry. Title without possession gives no right of entry. There is no evidence of possession by Marston or his heirs since the execution of the deed in 1771. The possession remained in Bayard until his death, in 1798, and has been continued until the commencement of this suit in 1826, a period of upwards of half a century, and no claim under the deed of 1771, which, if a deed of trust, will be presumed to have been satisfied. A surrender will be presumed of an outstanding title after such a lapse of time. (3 Johns. R. 386. 4 id. 211.)

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*Roosevelt*, in reply. The objection to the want of proof of the marriage of one of the lessors, is of the same character as the objection of misnomer; it serves only to reduce the plaintiff's claim another sixth. He is still entitled to recover four sixths. As to the objection of want of possession, a grantor and those claiming under him cannot allege the want of entry, or the absence of proof of acts of ownership, by a grantee in bar of a recovery. (1 Wendell, 341.) The right to presume a conveyance belonged to the jury, and not to the court. (2 Wendell, 3.)

*By the Court*, SUTHERLAND, J. I think the plaintiff was on the whole case, properly nonsuited. It is objected to a recovery under the first count, 1. That no possession is shewn ever to have been taken by Bayard's grantees, (of whom Marston was one,) under the conveyance to them of the 20th December, 1771; and 2. That no actual lease from Marston, before his death, (which took place in January, 1814,) was proved; and that the consent rule does not confess a lease which could not at the time be made.

First. Title and seisin are always considered united until a disseisin is shewn. (Co. Litt. 114, a. b.) A conveyance in fee having been shewn from Bayard, who is acknowledged to have been the original proprietor, to Marston and others, they are presumed to have entered into possession, or whoever was in possession is presumed to have held for them and in subordination to their title, until the contrary appears. A surrender or re-conveyance to Bayard cannot be presumed, because no foundation for such a presumption is laid by the evidence. The defendant shews no title or claim of right under Bayard, either in himself or those from whom he derived the possession. "Deeds, patents, and even acts of parliament, may be presumed to support the long and uninterrupted possession of a right or claim of right; but a conveyance will never be presumed to defeat the claim of a person shewing a good paper title, unless there has been an adverse possession or enjoyment under claim of right, in accordance with the fact presumed." In *Keene v. Deardon*, (8 East, 263,) Lord Ellenborough, in relation to a presumption of a

re-conveyance, says, "Presumptions of this sort, when fit to be made, are always made in favor of the possession of those who are rightfully entitled to it." The rule of presumption is *ut res rite acta est*, and is applied, whenever the possession of the party is rightful, to invest that possession with a legal title. Such a presumption will be made when it is necessary to clothe a rightful possession with a legal title; but the court must first see that there is nothing but the form of a conveyance wanting. But this presumption in favor of a grant against written evidence of title, can never arise from the mere neglect of the owner to assert his right, when there has been no adverse title or enjoyment by those in whose favor the grant is to be presumed; for the obvious reason that the presumption against the person shewing title, which arises from the delay in asserting his title, is equally balanced by the like presumption arising from the same delay on the part of the supposed grantee. (Opinion of Chancellor Walworth in *Schauber v. Jackson*, 2 Wendell, 35 to 38. 11 East, 372. Cowp. 214.)

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*Second.* It has frequently been decided that the death of the lessor of the plaintiff will not abate the action; (*Frier v. Jackson*, 8 Johns. R. 495; 1 Wend. 27; Adams on Eject. 288, 306; 2 Cowen 355;) but in all those cases the death of the lessors was after the commencement of the action. The defendant may move to have the demise of a lessor, who died before the commencement of the action, struck out of the declaration; (1 Caines, 20; 1 Johns. Cas. 392; Caines' Cas. in Err. 102; 3 Johns. R. 259;) and it seems the motion will in all cases (if the fact is not denied) be granted as a matter of course, and without costs to be paid to the plaintiff, on the ground that it is an irregularity in the plaintiff to make a dead man a lessor. Although, as a general rule, a lessor will be struck out of the declaration who is shewn to have *no subsisting interest in the premises*, yet, under special circumstances, the court will permit such a demise to be retained. (10 Johns. R. 368. 4 id. 483. 2 Cowen, 502.) But it is no where said that any state of facts will induce the court to retain a demise from a man who was dead when the suit was commenced. If this be so, it is a ground of nonsuit when the

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fact appears upon the trial and no other count is supported. Although the demise is a fiction, still the fiction must be such as might by possibility have been true. The lessor is supposed to have been capable of Making a demise not only at the time when the demise is alleged to have been made, *but when the suit was commenced.*

*Third.* The two counts on the demise of the heirs of Marston were not supported. The demise in both counts is *joint*, and there was no proof of title as to some of the lessors. The demise must be proved as laid. The persons who are supposed to have demised the premises, must be shewn to have had a legal power to demise; and if the demise is joint only, it should be proved that the lessors had such an interest as would enable them *to join in* a demise. (2 Phil. Ev. 171. 2 Caines, 174. 12 Johns. R. 185, opinion of Kent, Ch. J.) The marriage of Cornelia Dennis (one of the grand children of Thomas Marston) and John B. Martin, who are both lessors, was not proved, and of course no interest was shewn in Marston.

Motion to set aside nonsuit denied.

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SKELDING vs. WHITNEY.

Where, in consequence of the want of ordinary care and skill in laying the foundations of a house, about to be erected, *damage* was sustained by the owner of an adjoining house, and the parties thereupon entered into an agreement, by which it was stipulated that the work should proceed, that a partition wall should be built for the benefit of both parties, and that the *damages* and *compensation* should be passed upon by arbitrators; which submission was revoked previous to an award made, and an action for breach of covenant brought by the person who built the house to recover a *compensation* for a portion of the wall, in which action the defendant set off his *damages*, it was held, that such damages were a legitimate subject of consideration in such action of *covenant*, under the agreement between the parties, and having been submitted to and passed upon by a jury, a suit could not subsequently be sustained for a recovery of the same damages.

THIS was an action on the *case*, tried at New-York circuit, in April, 1827, before the Hon. OGDEN EDWARDS, one of the circuit judges.

The ground of complaint was, that the workmen of the defendant, in digging to lay the foundations of a store house

*It seems* that where a defence has been insisted on in a former action, submitted to and passed upon by a jury, and not objected to by the plaintiff in such action, although such defence be not the subject of set off in such action, a party will be precluded from subsequently maintaining an action for the subject matter thus set off by way of defence.

about to be erected by him, undermined the walls of a store house belonging to the plaintiff, situate on the adjoining lot, whereby the store house was injured and lessened in value.

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The defence set up was, that the damages claimed in this action had been urged as a set off by the present plaintiff, in a former action brought by the present defendant against him, and considered and allowed by a jury. It appeared that after the injuries complained of in the declaration in this cause had been principally done, the parties entered into an agreement under hand and seal, whereby, after reciting that the defendant (Whitney) was about to erect a store house on his lot, and to take down and rebuild the partition wall between the parties, it was agreed that Whitney should rebuild the wall, and have it done in a workmanlike manner, with a chimney and fire place for the use of Skelding. The whole subject matter between the parties relative to *damages* and *compensation* was referred to certain persons as arbitrators; the party against whom the award should be made to pay the sum awarded, on demand; and Whitney to give a good and sufficient conveyance to Skelding of the undivided half of the partition wall. Previous to any award being made, Skelding revoked the submission; whereupon Whitney brought a suit against him for a breach of his covenant. Skelding suffered judgment to pass against him by default, and the damages of the plaintiff were assessed by a sheriff's jury at six cents. After the plaintiff had rested his cause, and these facts had been shewn on the part of the defendant, the defendant offered to prove, that on the execution of the writ of inquiry in the cause of *Whitney v. Skelding*, Skelding appeared and proved, by way of set-off to the damages claimed by Whitney in that suit, *the identical damages* which he now sought to recover, and that the same were *allowed* to him by the sheriff's jury, and that *no objection was made* to his right to such allowance on the part of Whitney; which evidence was objected to by the plaintiff, and rejected by the judge. The defendant excepted. The plaintiff obtained a verdict for \$300, which was now moved to be set aside.

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*G. Griffin*, for defendant. The defendant ought to have been allowed to prove that the plaintiff had availed himself of the subject matter of this action, by way of defence in the action of the defendant against him. What has once been submitted to judicial investigation, cannot again be brought into question. (6 Johns. R. 168. 7 id. 20. 16 id. 136. 3 Cowen, 120.) And it matters not whether the defence interposed in the former action was properly a subject of set off or not, having been insisted on and not objected to by the opposite party; and thus having had the benefit of the defence, the party urging it is precluded from again setting it up. The consent of parties takes away error. (13 Johns. R. 185. 3 id. 433. 3 Caines, 152, 4.) A former recovery may be given in evidence under the general issue. (1 Chitty's Pl. 486.) Besides, the *damages* of the plaintiff were legitimately a subject of defence in the action of the defendant against the plaintiff. By the agreement between the parties, the whole subject matter, *damages* as well as *compensation*, were submitted to the arbitrators; by the revocation of the submission, only the *trials* were charged; a jury was substituted for the arbitrators.

*J. Anthon*, for plaintiff. The damage of the plaintiff was sustained previous to the agreement to submit. By the revocation of the submission, the parties were left *in statu quo*. (16 Johns. R. 205.) The defendant had no right to shew, by *parol*, that in his action against the plaintiff, the latter set off the subject matter of this action against the plaintiff's right of recovery in that case, because such proof is against the record. The record is of a suit in *covenant*, in which evidence of a *tort* was not admissible. To make a record in a former suit evidence, it should appear, *from the record itself*, that the matter alleged to have been considered in that suit, was in issue. (2 Johns. R. 24. 1 Esp. R. 43.)

*By the Court*, MARCY, J. As a defence to the present action, the defendant offered to prove that the damages now claimed were taken into consideration, and allowed without objection from the plaintiff, by the sheriff's jury, as a set off



to the demand claimed in the former suit between the same parties; but the judge refused to receive the evidence. The present application for a new trial rests mainly on the alleged error of this decision of the judge.

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In the former suit, there was no issue; the plaintiff's damages were assessed by a jury, and adjudged by them to be merely nominal. Was the claim of the plaintiff, for which this suit was brought, one that could properly be considered by the jury as a matter of set off in the former suit? If it was not, the right of the plaintiff to sustain this action still remains, even if the jury did in fact allow it as a set off. Such is the rule laid down in the case of *Manny v. Harris*, (2 Johns. R. 24.) There seem, however, to be some exceptions to this general rule; they are found in the cases of *King v. Fuller*, (3 Caines, 152,) *Wilson v. Larmouth*, (3 Johns. R. 433,) *Curtis v. Groat*, (6 id. 168,) and *McLean v. Hugarin*, (13 id. 184.) In the latter case, it is said by the court, "Although the demand in this case sounds in *tort*, and might not, in strictness, have been admissible as a set off on the former trial, yet if it were admitted without objection, and has been once tried, that judgment is conclusive with respect to that matter." It seems to be somewhat difficult to reconcile these cases with that of *Manny v. Harris*, unless we assume that the jury, in the latter case, made the set off without the assent of the defendant to the former suit; which assent seems to form the exception to the general rule. If it be admitted that the damages of the plaintiff were not a proper matter for the consideration of the sheriff's jury, this case falls within the authority of those cases which are supposed to be exceptions to the general rule; for the proof offered was, that the damages claimed in this suit had been submitted to the jury in the former suit between these parties, by the present plaintiff, without objection from the present defendant, and were allowed by the jury as an off set to the demand in that suit. This case, however, does not, in my opinion, involve the necessity of attempting to harmonize the decisions referred to, or to say precisely what shall constitute exceptions to the rule laid down in the case of *Manny v. Harris*.

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I think that the damages sought to be recovered here were properly brought before the jury in the former suit. Although the agreement was not entered into by the parties until most of the damage which is the subject of this suit had happened, yet, by fair interpretation, it is to be considered as relating not only to what was to be, but what had been done by the defendant, and to what damage had been, as well as what was to be sustained by the plaintiff. The import of the agreement is, that the whole matter should be submitted to and adjusted by the arbitrators. The suit instituted by the present defendant, for the violation of the agreement, necessarily brought under the consideration of the jury which assessed his damages, not only the benefits which the defendant in that suit had received, but the damages which he had suffered; for his claim was for the excess of benefit over damage. The plaintiff's damage having been once passed on by the jury, a suit cannot be sustained for them. The judge, therefore, in my opinion, erred in refusing to receive the evidence by which the defendant offered to establish the fact that the cause of action in this suit had been submitted to and passed on by the jury in the former suit between these parties.

Motion for a new trial granted.

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BANK OF ORANGE vs. A. BROWN and five others.

In an action against six, as proprietors of a steam-boat, in which they were charged as common carriers, for the loss of property put on board for transportation, and the gravamen was stated to have arisen from a breach of duty, it was held, that a plea in abatement that there were 54 other proprietors, who were jointly liable, was bad, and judgment of *respondens oster* was awarded.

An action solely upon the custom, is an action of tort, in which all or any number of the owners of a vessel, coach or any kind of conveyance used by common carriers may be sued, and on a verdict against all or a part only of those against whom the action is brought, judgment may be rendered.

The plaintiff has his choice of remedies, either to bring *assumpsit* or *case*; but when one or the other form of action is adopted, it will be governed by its own rules. If the plaintiff states the custom, and also relies on an undertaking, general or special, the action, though it may be said to be *ex delicto quasi ex contractu*, is in reality founded on the contract, and will be treated as such.

tion, whereof R. G. Cruttenden was master, used and navigated upon the Hudson river, between the cities of New-York and Albany, for the conveyance and transportation of goods and chattels for hire and reward, touching on her passages up and down the river at the village of Newburgh, for the landing and delivery of freight, goods and chattels; that the plaintiffs, to wit, the president, directors and company of the Bank of Orange County, on the 15th November, 1827, at the city of New-York, caused to be delivered to the captain a parcel of bank notes of the value of \$11,250, to be safely and securely carried and conveyed in the said vessel or steam-boat from the city of New-York to the village of Newburgh, and there to be delivered to one William Phillips, for certain freight and reward; and the said master then and there took and received the same for the purposes aforesaid; and although the said vessel or steam-boat on the same day safely arrived at Newburgh, and no dangers of the seas, nor the act of God, nor the enemies of the people, &c. prevented the safe carriage of the said bank notes, yet the plaintiffs averred that the said defendants, or their said agent, not regarding their duty in that behalf, but contriving, &c. to deceive and defraud the plaintiffs, did not deliver the said bank notes to the said William Phillips, but so negligently, carelessly and improperly conducted the carriage and conveyance thereof, that for want of due care in the defendants, their servants and agents, the said bank notes were wholly lost to the plaintiffs. The second count states that the defendants were *common carriers* of goods and chattels, according to the custom of the state, and that the bills were delivered to them to be carried from New-York to Newburgh, for certain freight and reward; that although the vessel arrived, the bills were not delivered, but were lost for the want of due care, and through the negligent, careless and improper conduct of the defendants, their servants and agents. The third, sixth and eighth counts are substantially like the first, and the fourth, fifth and seventh counts are like the second count. The ninth count is in *trover*. To the ninth count, the defendants pleaded the general issue, and to the first eight counts they put in a plea in abatement, that on the day in the said

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several counts of the declaration mentioned, 54 other persons, (naming them,) together with the six defendants, were joint owners and proprietors of the vessel or steam-boat in the declaration mentioned; and that if any such injury happened as is complained of in the said several counts, the said 54 persons are *jointly* liable with the defendants for the same, as such joint owners and proprietors, &c. The plaintiffs demurred to the plea in abatement, and the defendants joined.

The demurrer was very ably argued by *Talman*, for the plaintiffs, and *B. F. Butler*, for the defendants. A great number of cases bearing upon the question, whether in an action of this kind the non-joinder of other parties can be plead in abatement, which have arisen and been decided in the English courts, from that of *Boson v. Sandford*, to be found in 1 Shower, 29 and 101, and 2 id. 478, which first came before the court of king's bench in 1687, to the case of *Butherton v. Wood*, 5 Broderip & Bingham, 54, decided in 1821, and all the cases, upon the point arising in this court, were cited and commented upon by the counsel: but as many of the authorities cited are reviewed in the opinion of the chief justice, it is deemed unnecessary to attempt a sketch of the arguments of the counsel.

*By the Court*, SAVAGE, Ch. J. This is an action on the case against six defendants as common carriers, alleged to be the owners of the steamboat *Constellation*, charged in the first eight counts of the declaration with having received bank bills to a large amount for transportation from the city of New-York to the village of Newburgh, which it is averred were lost through the want of due care, and by the negligent and improper conduct of the defendants and their servants. The ninth count is in trover, to which the defendants have pleaded the general issue. To the first eight counts they have pleaded in abatement that fifty-four other persons, together with the defendants, are joint owners and proprietors of the steam-boat *Constellation*, and are *jointly* liable for any damage the plaintiffs may have sustained. The plaintiffs have demurred, and the question presented for adjudication is, whether it is necessary to *join* all joint owners in this suit?

It is not denied, that in an action against joint contractors as such, all must be joined; and if the action be brought against a part only, those who are sued may plead in abatement the non-joinder of the other joint contractors. Nor is it denied that, in an action for a *tort*, the plaintiff may prosecute all or any portion of those concerned in such tort. But an action on the case, against common carriers, upon the custom of the realm, seems in England not to be considered always as belonging entirely to the class of actions arising *ex contractu*, nor to those arising *ex delicto*, but is said sometimes to be a case arising *ex delicto quasi ex contractu*.

Every person who undertakes to carry, for a compensation, the goods of all persons indifferently, is as to the liability imposed, to be considered a common carrier. There is an implied undertaking on his part to carry the goods safely, and on the part of the owner to pay a reasonable compensation. No special agreement is necessary to enable the owner to maintain assumpsit against the carrier for breach of his duty, nor to enable the carrier to maintain assumpsit for his compensation. There is therefore a perfect contract implied between the carrier and his employer. As this contract is implied by law, so also where any person becomes a common carrier by professing to carry for all persons indifferently, the law imposes upon him duties and liabilities arising out of his public employment, and imposes upon the employer the liability of making compensation. Considerations of public policy, and not agreements between the parties, have ascertained the duties and fixed the limits of the liability of common carriers; and for any omission or neglect of duty an action lies without stating any consideration or contract between the parties; for the negligence is the cause of action, and it is not necessary to state or rely upon an assumpsit. (*Coggs v. Bernard*, 2 Ld. Raym. 909.) "There may be, and often is a special contract made with a common carrier, and such special contract is to control; but without any agreement whatever, the bare delivery of goods to the carrier, imposes upon him the obligation to dispose of them according to the directions which he receives; and a neglect to comply with such directions subjects him to an action,

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because says Lord Holt, "A neglect is a deceit to the bailor; for when he entrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him; and a breach of a trust, undertaken voluntarily, will be a good ground for an action." (2 Ld. Raym. 919.) This was said in relation to Lord Holt's sixth class of bailments, where the bailee acts without compensation; but applies with equal if not greater force to his fifth classification, where the bailee acts for a reward.

The form of action against a common carrier, is a question which has been considerably agitated in the English courts, and has been different as the *gravamen* was supposed to arise upon a breach of public duty, or the breach of mere express promise. Each form has its advantages and disadvantages. If *assumpsit* is brought, or the action be laid as arising upon contract, it may be abated for the non-joinder of proper parties; but it survives against the personal representative, and the common counts may be joined in the declaration. If the action be laid as arising *ex delicto*, and founded on the custom, the suit does not abate for the non-joinder of all the proper parties; and, in a proper case, a count in *trover* may be joined. "The present usage," says Mr. Jeremy, in his *Law of Carriers*, p. 117, "sanctions the principles and adopts the advantages of both forms of action, by permitting the cases to be considered either way, as arising *ex contractu* or *ex delicto*, according as the neglect of duty or breach of mere express promise is meant to be relied upon as the cause of injury." Mr. Chitty supposes the plaintiff has his choice of remedy, (1 Chitty's Pl. 75, 6,) and that in an action founded upon the custom, no advantage can be taken of the non-joinder of defendants, and refers to the cases which were cited upon the argument. He has given precedents of declarations both ways, (2 Chitty, 117 and 271, 2:) according to which, the declaration in this case is clearly founded upon the negligence of the defendants, and not upon an express promise.

It may be useful to review very briefly some of the leading cases in the English courts on this subject. *Boson v. Sand-*

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*ford*, (2 Show, 478,) is one of the earliest cases. It first came before the court of king's bench in 1687. The declaration stated that the plaintiff had laden on board the defendants' ship divers goods, to be carried from London to Topisham for a reasonable freight, and that the defendants received the said goods, "*and them to transport and carry in from aforesaid did undertake,*" but the defendants so negligently carried the same that they were spoiled. At the trial *at nisi prius*, before Lord Herbert, then chief justice, a special verdict was found, the chief justice expressing an opinion that all the owners ought to be joined. When the case was argued at bar, two points were made: 1. Whether the proprietors were answerable? 2. Whether, there being other owners, the action lies against the defendants alone? Sir John Holt, who was now chief justice, expressed an opinion upon the argument that the owners were liable because they have the profit; and he remarked, that if the action be brought upon the *contract*, then all are bound; but if it be founded upon the *tort*, then he, (the plaintiff) may have an action joint or several. He adds, "Here it is not brought upon the express contract, but yet they have all the recompense: so that the reason why they are answerable goes to all, and therefore I doubt it must be brought against all;" but it was adjourned. (1 Show. 29.) The cause was again argued at the next term, (1 Show. 101,) and at the succeeding term the judges delivered their opinions *seriatim*. They all agreed that the action was upon an implied contract, but that contract was entered into by all the proprietors, and that the plaintiff could not recover against a part. Dolbin, justice, thought that the defendants should have pleaded in abatement. Holt, chief justice, says, "This action is grounded upon the trust, and that doth imply a contract. Then in all cases where the action is grounded on a contract, all that are privies to the contract shall take advantage of this omission on the general issue." This case is also reported in 3 Mod. 321, 2 Salk. 440, and in other books, but the report in Shower is the most satisfactory. This case decided three points: 1. That the proprietors as well as the master of the vessel were liable for damages; 2. That the action



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being upon contract, all the proprietors must be joined; and 3. That the non-joinder need not be pleaded in abatement, but was good ground of nonsuit at the trial. This latter point was ruled the other way in *Rice v. Shute*, in king's bench, (5 Burr. 2811,) decided in 1770, and in *Abbott v. Smith*, in the common pleas four years afterwards, (2 Bl. 947,) and that the non-joinder must be pleaded in abatement; and such has been the common practice ever since.

The case of *Dale v. Hall*, (1 Wils. 281,) decided in 1750, is no otherwise important, only as it shews the opinion of the court, that the defendant was liable as a common carrier in an action of assumpsit, and that the liability of a common carrier is based upon contract.

The next case in the order of time is *Mitchel v. Tarburt*, (5 T. R. 649, decided in 1794. This was an action against the defendants for the negligence of their servant in running their ship against the plaintiff's ship. To this declaration the defendants pleaded in abatement the non-joinder of other joint owners. Demurrer and joinder. The case of *Boson v. Sandford* was cited by the counsel for the defendants; in answer to which Lord Kenyon says, that that case was treated by the whole court as an action for a breach of contract: and that it was there decided, that in an action arising *ex delicto*, the plaintiff may sue all or any of the parties. The case then before the court they considered an action *ex delicto*. The declaration charged that the defendants, by their servant, so negligently navigated their vessel, that by reason of the negligence of their servant, the defendant's ship struck the plaintiff's ship with great force and violence, &c.

The case of *Buddle v. Wilson*, (6 T. R. 369, decided in 1795,) came on soon after in the same court, and was an action on the case against the defendant, as a common carrier, and charged that the plaintiff delivered the defendant certain goods to be carried for hire from London to Devizes, yet the defendant did not carry them, but neglected to do so; and that by the carelessness of the defendant and his servants, the goods were lost. The defendant pleaded in abatement the non-joinder of two others, to which there was a demurrer. The court held the plea in abatement bad, because not plead-



ed until after a general imparlance ; but Lord Kenyon said it might have been supported if pleaded in proper time, and referred to 1 Wils. 282, Denison's opinion, that the declaration upon the custom of the realm was the same with the one then before the court, which was assumpsit.

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Next is the case of *Govett v. Radnidge*, (3 East, 62, decided in 1802.) The declaration was, that the defendants had the loading of a hogshead of treacle upon a cart for a reasonable reward ; but they so carelessly and negligently conducted themselves that they let fall the hogshead and it was damaged. On not guilty pleaded, one defendant was found guilty and the other not. A motion was made in arrest of judgment. Lord Ellenborough gave the opinion of the court. He considered *Boson v. Sanford* as clearly an action of assumpsit, and therefore not applicable ; and that Lord Kenyon had decided *Buddle v. Wilson* upon that case. But this point was not necessary to be decided in *Buddle v. Wilson*. Lord Ellenborough, therefore, prefers placing reliance upon *Dickon v. Clifton*, (2 Wils. 319, decided in 1766, which was not cited to Lord Kenyon ; in which case it was decided that trover might be joined with an action for misfeasance, and also with an action against a common carrier ; and the court held that the first count was upon tort. That count was against a person employed by him to transport, in the plaintiff's own vessel, a quantity of malt, but that by his carelessness and negligence, a portion of the malt was lost ; and Lord Ellenborough argues, " What inconvenience is there in suffering the party to allege his gravamen, if he please, as consisting in a breach of duty arising out of an employment for hire, and to consider that breach of duty as tortious negligence, instead of considering the same circumstances as forming a breach of promise implied from the same consideration of hire ?" He considers *Dickon v. Clifton* as settling the point in a manner the most conducive to justice and convenience, and as not being overruled by *Buddle v. Wilson*. The court decided that the acquittal of one defendant, in an action founded on neglect of duty, and not upon breach of promise, did not prevent the plaintiff's having judgment

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against the defendant against whom the verdict was obtained.

Next in order of time is the case of *Powell v. Layton*, (5 Bos. & Pol. 365, decided in 1806.) The declaration charges that the plaintiff, at the special instance and request of the defendant, had caused to be delivered to the defendant divers goods to be conveyed by him, &c. and them delivered in like good order, dangers of the seas, &c. excepted, for a certain freight; and although the defendant received the said goods, he did not carry and deliver them, but wholly failed and neglected so to do, &c. The defendant pleaded in abatement that there were two others jointly interested, one of whom was still alive. To this plea the plaintiff demurred. Sir James Mansfield, chief justice, delivered the opinion of the court. He assumed what is not disputed, that if the action is founded in contract, the plea in abatement is good. He then proceeds, and endeavors to prove that the declaration is founded on contract. He refers to Cowp. 375, and to the assertion of Lord Mansfield, that if a common carrier accept goods to carry, and then die, an action will lie against his executor. He asks, "How is that? Why, because the action is founded on contract. Indeed, Lord Mansfield says it must not be an action on the custom of the realm, which would be in tort, but it must be an action of contract." Lord Mansfield was discussing the question whether trover would lie against an executor for a conversion by his testator. He had taken a distinction which is an important one, between the *cause of action* and the *form of action*; and he argued that the cause of action might survive, though not in the same form as against the testator. He says: "But in the most if not all the cases where trover lies against the testator, another action might be brought against the executor, which would answer the purpose. An action on the custom of the realm against a common carrier is for a *tort* and supposed crime; the plea is not guilty; therefore it will not lie against an executor. But *assumpsit*, which is another action for the same cause, will lie." What is here said by Lord Mansfield, seems to me to shew conclusively that there are two remedies against a common carrier, either of which may be pursued,

one in tort, the other in assumpsit; and no intimation is given that the two actions are to be blended or run into each other in any particular.

The next case is *Max v. Roberts*, (12 East, 89, decided in 1810.) It is a writ of error in the king's bench from the common pleas. It was a special action on the case against the defendants, owners of a ship in which the plaintiff had sent goods from Liverpool to Waterford. The vessel made a deviation in her voyage, by reason of which the goods were lost, and by means of which the plaintiff failed in an action against the insurer, and therefore claimed damages. This case was decided in the common pleas upon the same principle as that of *Powell v. Layton*. It was argued in the king's bench, and afterwards in the exchequer chamber, before the twelve judges, but decided at last on the insufficiency of the declaration. The precise question here was, whether, in such an action, a verdict could be given acquitting some of the defendants and finding others guilty.

The case of *Butherton v. Wood*, (5 Brod. & Bing. 54, decided in 1821,) was a writ of error in the exchequer chamber. Wood, the plaintiff below, sued ten defendants, as proprietors of a stage coach, for injuries he had received by being upset by careless driving, while he (the plaintiff) was a passenger. At the trial, the jury found two of the defendants not guilty, and a verdict against the others, on which the king's bench rendered judgment; and for this cause error was brought into the exchequer chamber. On the argument, all the preceding cases, and some others, were cited. Dallas, chief justice of the common pleas, delivered the judgment of the court. He said it had been contended that the declaration was upon contract, and he admitted, if it were so, all the joint contractors must be made defendants; but the court thought that rule applicable to cases where it was necessary to shew a contract on trial. "This action is on the case against a common carrier, upon whom a duty is imposed by the custom of the realm, or, in other words, by the common law." "A breach of this duty is a breach of the law; and for this breach, an action lies founded on the common law, which action wants not the aid of a contract to support it." The action of as-

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sumpsit, he admits, would lie; but it was of recent use to an action on the case, which was as old as the law itself. He considered this action as founded on a breach of duty depending on the common law, on a tort or misfeasance; and was therefore several as well as joint. He considered the cases of *Powell v. Layton* and *Max v. Roberts* as founded upon a particular contract, and therefore not in the way. He concludes by saying, "At present it is sufficient to say that this action is founded on a misfeasance, and that the declaration is framed accordingly; and therefore that the verdict and judgment given against some of the defendants is not erroneous, and ought to be affirmed."

These are all the cases necessary to be noticed; and I hope this short review of them may elucidate the subject.

It is not to be denied that there has been a difference of opinion between some of the English judges on the question whether an action against a common carrier is an action founded on a tort or on a contract. Dallas, chief justice, seems to put that question at rest, by bringing it to a very fair test: does it require the plaintiff to shew a contract, express or implied, to support it? The action on the case was at last decided to be for a tort or misfeasance. This was clearly the opinion of Lord Mansfield in the case cited by Ch. Justice Mansfield; and all the cases in which it has been held necessary to join all the joint owners, have been said by distinguished judges to be clearly actions upon a promise. Much of the confusion has probably grown out of the forms of declaring in some of the cases, where it is difficult to determine whether the promise and undertaking often stated in the count, or the custom of the realm, also stated, is intended by the pleader to be the foundation of the action.

I apprehend the true rule now is, that an action solely upon the custom is an action of tort; that in such action all or any number of the owners of a vessel, coach, or any kind of conveyance used by common carriers, may be sued, and judgment may be rendered on a verdict against all or a part only of those against whom the action is brought; the plaintiff has his choice of remedies; either to bring assumpsit or case; and that when one or the other action is adopted,

it must be governed by its own rules. But if the plaintiff states the custom, and also relies on an undertaking general or special, as in *Boson v. Sandford* and some other, then the action may be said to be *ex delicto quasi ex contractu*, but in reality is founded on the contract, and to be treated as such.

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In *Allen v. Sewall*, (2 Wendell, 338,) in giving the opinion of the court, I remarked that all the copartners should have been sued, as the action was *quasi ex contractu*. It was unnecessary in that case to say any thing on that point, as no plea in abatement had been pleaded; and upon further examination, I am satisfied the remark is incorrect, for the reasons above assigned.

It is certainly now settled in England, that an action against a common carrier upon the custom, is founded on a breach of duty; that it is a tort or misfeasance; and it follows that it is joint or several.

In the case now under consideration, all the counts are substantially upon the custom and in case, though some of them contain expressions similar to those used in actions of assumpsit but there is none of them which relies upon any undertaking of the defendants, and they all state the gravamen to be a breach of duty.

I am therefore of opinion, that an action on the case against a common carrier belongs to the class of actions arising upon a tort or misfeasance *ex delicto*; and that such actions being as well several as joint, it is unnecessary to join all the joint tortfeasors. The demurrer is well taken, and the plaintiff is entitled to judgment of *respondeas ouster*.

Justices SUTHERLAND and MARCY did not hear the argument of this case, and gave no opinion.

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OSBORN VS. MONCURE and ROBINSON.

An action brought against the maker of a promissory note on the third day of grace is prematurely brought, and advantage may be taken of the error on the trial by nonsuiting the plaintiff.

The maker has the whole of the third day of grace in which to make payment; though it seems that notice to the endorser on the third day of grace after demand and default of payment by the maker, would be good.

THIS was an action of assumpsit, tried at the New-York circuit, in June, 1828, before the Hon, OGDEN EDWARDS, one of the circuit judges.

The suit was by the plaintiff, as payee against the defendants, as makers of a promissory note. On the third day of grace payment was demanded at the counting house of the defendants, of a clerk therein, (the defendants not being present,) who said the note would not be paid. The defendants had stopped payment a few days before. The plaintiff had a *capias* issued, upon which the defendants were arrested previous to three o'clock P. M. of the third day of grace. The note having been proved, and these facts appearing, the defendants' counsel moved for a nonsuit, on the ground that the action was prematurely brought. The judge refused to grant the motion, and a verdict was rendered for the plaintiff. The defendants excepted to the opinion of the judge, and now moved to set aside the verdict.

*D. P. Hall*, for defendants. A promissory note payable to order, and negotiable by the statute, is entitled to *days of grace*, (6 T. R. 123; 8 Cowen, 203;) and a maker of such note, which has not been negotiated, but remains in the hands of the original payee, the whole of the last day of grace within which to make payment. (2 Cowen, 766, 736. 4 T. R. 148. Chitty on Bills, 365, 401, 420.) The fact of the suit having been brought prematurely not appearing on the face of the declaration, and it being shewn on the trial, the defendant may then take advantage of it by moving for a nonsuit. (8 Cowen, 203. Archb. 285. Chitty, 443.)

*R. M. Blatchford*, for plaintiff. A demand having been regularly made, and the note dishonored, the plaintiff had a right immediately to bring his suit. Such is considered the law in England. The contract of the maker of a note is, to pay *on demand on the appointed day*: and payment not be-

ing made on such demand, the contract is broken, and the holder may treat the note as dishonored. (Chitty on Bills, 285.) After the dishonor of a note, why should the holder wait until the next day to commence his suit? A notice to an endorser of demand and refusal on the third day of grace has been holden good. (1 Johns. Cas. 328.) If an endorser may be sued on the third day of grace, why not the maker? In Massachusetts, an action was considered well brought against the maker on the third day of grace, after demand and refusal to pay. (1 Pickering, 401.)

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*Hall*, in reply. The court in Massachusetts, in 2 Pickering, 123, retract much of what was said in 1 Pick. 401.

*By the Court*, SUTHERLAND, J. The only question in this case is, whether the suit was prematurely commenced. It is admitted that the writ was served before three o'clock P. M. of the the third day of grace, payment having previously been regularly demanded and refused; the defendants having failed some days before. It is not denied that the maker is entitled to the days of grace. (2 Cowen, 766. 8 Cowen, 265, and the cases there cited. Chitty on Bills, 420, 1.)

Notice to the endorser on the third day of grace, after a demand upon the maker and his default of payment, is good although it need not be given until the following day. It being earlier than is required, cannot form any objection on the part of the endorser. (1 Johns. C. 328. Chitty on Bills, 365. 3 Campb. 193.) The demand upon the maker should be made on the third day of grace, and within a reasonable time before the expiration of the day, (2 Caines, 244; 12 Johns. R. 424;) and if he then refuses payment, the holder has done all that is incumbent upon him to do, and may treat it as a dishonored bill, so far as immediately to give notice to the endorser; but still I apprehend the maker has the whole of the day to pay in, if he thinks proper to seek the holder. It is undoubtedly true in relation to other contracts, that the party has until the last instant of the day to make payment; and I perceive no reason for making negotiable paper an exception to the general rule. (3 Bos. & Pul. 602. 4 T. R. 170. Chitty on Bills,

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365, notes.) Mr. Chitty seems to think the rule is differently settled.

The cases of *Crygier v. Long*, (1 Johns Cas. 393,) and *Lawrence v. Bowne*, (2 Johns. 225,) seem to decide, that after appearance and pleading in chief, a defendant cannot object, the suit being upon a note, that it was commenced before the note was due; and it is there said that he should apply to the court to be discharged from the arrest. But, upon general principles, I do not see how a defendant can be deprived of the benefit of such a defence upon the trial. The plaintiff, under the plea of non-assumpsit, is bound to shew a good cause of action *at the time of the commencement of the suit*, and the defendant may give in evidence any thing which shews that the plaintiff had not such cause of action at that time. (1 Phil. Ev. 131.) It is well settled that the issuing of the *capias* is the commencement of the suit, and the plaintiff's cause of action must exist at that time. (3 Johns. Cas. 149. 1 Caines, 69, 72. 3 id. 133. 2 Johns. R. 346. 3 id. 42. 10 id. 119, and 8 Cowen, 205, where the cases are collected.) Mr. Chitty, (1 Chitty's Pl. 443,) says, that where a suit is prematurely brought, it is ground of demurrer or nonsuit. This appears to me to be the true rule. I am therefore of opinion that the judge ought to have nonsuited the plaintiff.

New trial granted.



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F. & H. CHANOINE vs. FOWLER.

THIS was an action of assumpsit by the payees against the drawer of a bill of exchange, tried at the New-York circuit, in June, 1828, before the Hon. OGDEN EDWARDS, one of the circuit judges.

The bill bears date the 15th December, 1825, at New-York, and is drawn on Messrs. Phillipon & Co., Havre, for 6839  $\frac{3}{4}$  francs, payable to the plaintiffs or order. On the 26th January, 1826, it was presented for acceptance, which was refused for want of advice. It was presented by *huissier audiencer* (bailiff) of the tribunal of commerce at Havre, in the presence of two witnesses, and by him protested for non-acceptance, in conformity to the 173d and 174th articles of the Code of Commerce of France. The protest was signed by the *huissier* and the witnesses, but had no seal attached to it. The code was proved in this manner: A witness was produced, who testified that he was chancellor of the French consulate in the city of New-York, commissioned by the king of France, and produced a printed book, purchased by him at a book-store in Paris in 1825, which he testified contained the law of France, and corresponded with the official edition; that there was a copy of the laws in the office of the consulate, given to the consul by the government, by which the witness regulated his official acts, also corresponding with the book produced by him. The defendant's counsel agreed so to consider it, but objected to the evidence as insufficient to prove the law of France. The objection was overruled.

The bill was purchased by the house of H. D. & E. B. Sewall for remittance, and was sent on the day of its date to the plaintiffs, who reside at Epernay, about thirty leagues east of Paris. The first intelligence that the Messrs. Sewalls

laws of the country in which he resides, and such laws are duly proved; evidence beyond the production of the bill and protest would be required to shew the authenticity of the act.

Notice of the non-acceptance of a bill of exchange cannot be given by a stranger; it must be by a party to it, or by one who, on the bill being returned to him, would have a right of action upon it.

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had of the non-acceptance of the bill, was on the 4th or 5th of April, by letter from the plaintiffs, dated 25th February, 1826; though on the 18th April they received a letter, dated 1st February, 1826, containing the same information.

H. D. Sewall proved the receipt of the letters, and testified that he did not personally give notice of the non-acceptance of the bill to the defendant, but had no doubt that such notice had been given, as it was the custom of his house to give regular notice in such cases; that between the 4th or 5th and the 14th April, the defendant, in a conversation with him, spoke of the bill, and was then aware that it had not been accepted; he said that it would be [paid, and did not complain of want of notice. This witness stated that it took two days for the mail to go from Havre to Epernay; that the regular packet sails from Havre on the first of February, and that the passages at that season of the year are from 30 to 60 days. The plaintiffs rested. The defendant moved for a nonsuit, which was denied.

The defendant then proved by a witness produced by him, that he (the witness) was a merchant in the French trade; that on the 23d day of March, 1826, he received in the city of New-York, by a regular packet, (the Bayard) which left Havre on the 2d February, a letter dated 31st January, 1826, and that another packet left Havre on the 15th February; that he also bought a bill of the defendant on Phillimon & Co. and remitted it on the 15th December, 1825, to Paris, from whence it was sent to Havre to be accepted; and that he received notice of protest from a notary.

The judge, in charging the jury, instructed them that if the defendant had information in due time of the non-acceptance of the bill, no matter how he got it, it was good. The defendant excepted. The jury found for the plaintiff for the amount of the bill, with interest, damages, &c.

*M. C. Patterson*, for defendant. A foreign bill of exchange must be presented and protested by a *notary*; to whose acts, but not to the acts of any other officer, general credence is given in such cases. (3 Burn's Eccl. Law, and Jacob's L. D. tit, Notary. Molloy, 281. Salk. 131. Ld. Raym. 993. 6 Mod. 80. 4 Camp. N. P. 129. Chitty on Bills, 215, 16.

4. T. R. 175. 1 Phil. Ev. 301. Peake, 73. 3 Johns. R. 311. 2 H. Black. 275.) Courts do not judicially take notice of the seal of a foreign tribunal; much less will they give verity to the mere signature of an officer not known to the commercial law. If, by the laws of France, the protest was properly made, such laws should have been proved in the manner that foreign laws are required to be proved. The evidence of the officer of the French consulate amounted to no more than a certificate of a consul that such was the law, which has been adjudged insufficient. (1 Cranch, 138. 2 id. 137, 237. 1 Johns. R. 385.) Notice to the drawer of the non-acceptance of the bill was not shewn. The evidence amounted to a bare presumption that such notice was given, which is not enough. Even knowledge of the fact brought home to the drawer, is not equivalent to notice. (4 Barn. & Cres. 339. 14 Mass. R. 116. Bayley, 161, 163. 8 Taunt. 92. 3 Bos. & Pul. 239. Doug. 515. 11 East, 116. 7 Vesey, 597. Chitty on Bills, 226.) Consequently, the charge of the judge was erroneous.

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*W. Slosson*, for plaintiff. In default of a notary, a protest may be made by any officer whom the law merchant recognizes; and in the case of a foreign bill, the production of the bill and protest is sufficient, without other proof, to charge the party. (2 Phil. Ev. 265, 566. Chitty, 217. Bayley, 385. Peake's Ev. 342.) A notary's seal is not necessary to a foreign protest. (Molloy, 281, book 2, c. 10, § 25. Malyne, 273. 12 Mod. 345. Cunningham on Bills, 40.) Where a protest is made, though not by a notary, if regular on its face, courts will sustain it, and receive it as evidence of the facts contained in it. It is of necessity it should be so, on account of the intolerable inconvenience to which parties would otherwise be subjected in producing proof.

The evidence of the chancellor of the French consulate, and the production of the code, admitted to be a copy of that in the consul's office, delivered to him by the government of France, was as high and conclusive evidence of the law of France as could be offered. The commercial code being incorporated into the Code Napoleon, cannot be proved in the

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usual way of proving foreign written laws, without the production of the whole code. This surely will not be required. Several late decisions in England go far to shew that the evidence on this point was sufficient. (1 Dowling & Ryland, 38. 3 Starkie's R. 178. 30 State Trials, 514.)

There was due notice of the dishonor of the bill. There were no *laches* in France; and previous to the 14th April, the drawer knew that it had not been accepted. Such knowledge was correctly submitted to the jury; they have passed upon it, and the court will not disturb their verdict. An endorser has rights in relation to notice, and the person giving it, which the drawer has not. To the latter, it is immaterial from whom the notice comes; the real question being, was he apprized of the non-acceptance, so that he might secure himself? (Selwyn, 253, note by Wheaton. 2 Campb. N. P. 273. 4 id. 87. 1 Starkie's N. P. 34. Chitty on Bills, 227, 8. 18 Johns. R. 327.)

*By the Court, MARCY, J.* Several questions arise in this case. Those which it is necessary to consider are the following:

I. Was there the proof that the bill of exchange was regularly protested for non-acceptance?

II. Was sufficient notice of the protest given to the defendant?

The custom of merchants requires that there should be a protest in case of the non-acceptance of a foreign bill of exchange; and the proper officer to make this protest is a notary public, unless it is to be made at a place where there is no notary; and then it may be by a substantial person of such place, in presence of two or more witnesses. (Bayley on Bills, 165.) The bill on which this action is brought, does not purport to have been protested by a notary; and there is nothing in the case to shew, nor is it pretended that the protest was made at a place where there was no resident notary; but it is said the bill was duly protested according to the provisions of the commercial code of France. In answer to this, it is contended, on the part of the defendant, that there is no proof that the protest was made

pursuant to the provisions of that code, and that if it was so made, it was not a sufficient protest according to the custom of merchants.

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As the plaintiffs endeavored to establish their right to recover by shewing a protest, made not in the usual manner recognized by the general commercial law, but, as they alleged, according to the particular code of France, it was incumbent on them to prove that code.

A foreign law, if it be unwritten, is to be proved as a matter of fact, and this is done by examining some intelligent person of the country whose law is to be proved. (2 Starkie's Ev. 569. 1 Johns. R. 394.) The French commercial code is not an unwritten law, and it could not therefore be established by this mode. It is known to be a digested code, and to prove it the plaintiffs introduced the chancellor of the French consulate at New-York, who produced a book in the French language purporting to contain this code. It was not the official edition of the laws of France, but the witness stated that it was conformable to that edition, and that he regulated his official conduct by the laws contained in the book he produced. He also stated that it was an exact copy of the laws furnished by the French government to its consul at New-York, and the defendant agreed so to consider it. The proof in this case is then, by the agreement of the parties, the book furnished by the French government to its consul at New-York, purporting to be conformable to the official edition published by that government. In the recent case in this court, of *Packard v. Hill*, (2 Wendell, 411,) it is decided that the written laws of a foreign state must be proved by an exemplification, and cannot be proved by the printed statute book of such state. In that case a printed book, purchased in the Havanna, purporting to contain the royal charter establishing the court of *consulado*, was declared to be incompetent evidence of that charter. This decision is in conformity to the doctrine laid down by the supreme court of the United States, in the case of *Church v. Hubbard*, (2 Cranch, 236.) In that case, two edicts of the crown of Portugal were produced, certified by the consul at Lisbon, under his official seal, to be copies of the originals. This was

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adjudged to be insufficient proof of these edicts. The court say, "The consul was not sworn; he has only certified that they (the edicts) are copies from the originals. To give his certificate the force of testimony, it will be necessary to shew that this is one of those consular functions to which the laws of this country attach full faith and credit. It is further said, that "though consuls are officers known to the laws of nations, and entrusted with high powers, they have not the power of authenticating the laws of foreign nations. They are not the keepers of those laws. They have no official copies of them." The book of laws in the possession of the French consul at New-York, is not evidence of the laws of France. Without these laws were proved, there was nothing to shew that the *huissier* had any authority to protest the bill of exchange on which this suit was brought.

It may be proper to consider the effect of the protest mentioned in this case, on the assumption that it was made pursuant to the commercial code of France. Where the laws of a particular country have designated the officers who are to make protests of bills, and regulated the manner in which it is to be done, protests made by such officers, in the manner prescribed, would undoubtedly be regarded in every other country as valid; but the court are inclined to the opinion, that as these officers are unknown to the custom of merchants, their acts ought to be authenticated. It would be an innovation, perhaps a dangerous one, to give to the acts of any person who might be authorized to protest foreign bills by a law or regulation of any particular country, the same faith and credit that is given to those of a notary public, whose functions, so far as they relate to commercial transactions, are not created by the laws of any particular state, but by the custom of merchants, which is in fact the commercial law of nations. I am therefore of opinion that the bare production of the papers on the trial, purporting to be the proceedings of the *huissier*, without authentication, was not sufficient evidence of his performance of the acts stated in them.

To determine whether the defendant had legal notice of the non-acceptance of the bill, it will be necessary to

see when it was given, and from whom it came. Messrs. Sewalls had transmitted the bill to France, and received information of its non-acceptance on the fourth or fifth of April. H. D. Sewall says he did not himself give notice thereof to the defendant, nor does he know that notice was given by his house; although it was their custom to give notice in such cases, and he has no doubt the defendant received it. He learned, from a conversation with the defendant between the time of receiving notice and the 14th of April, that he had knowledge that the bill was dishonored. The judge, at the trial, ruled that the defendant had notice in due time of the non-acceptance of the bill, it was no matter whence it came, it was available to the plaintiffs. The rule of law in relation to the notice was, I apprehend, laid down in a manner too broad and unqualified. The rule has heretofore fluctuated; but it never has been authoritatively stated, as I can find, to be as the judge laid it down on the trial, except in the case of *Shaw v. Coates*, at the sitting before Lord Kenyon, mentioned in Selwyn's 'N. P. 320, n. 25. Repeated decisions since, both in *term* and at *nisi prius*, have qualified and restricted the broad proposition of the judge in this case, and of Lord Kenyon in the case of *Shaw v. Coates*. In some instances, it has been decided that the holders or their agents are the only persons to give notice of the dishonor of bills; but it seems to be now settled that it is not absolutely necessary that the notice should come from the holder of a bill, but may be given by any person who is a party to it, and who would, on the same being returned to him, have a right of action on it. (Chitty on Bills, 229. 2 Campb. 273. 1 Stark. R. 29. Bayley on Bills, 161.) A notice from a mere stranger is not sufficient; and the charge of the judge was broad enough to sanction such a notice. For the insufficiency of the proof of the French commercial code and of the protest of the bill, and the misdirection of the judge as to the notice, a new trial ought to be granted.

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New trial granted.

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JACKSON, ex dem. Montresor and others, vs. E. and A. RICE.

A grantor, with covenant of warranty, is a competent witness for his grantee in an action of ejectment brought by him for the recovery of the possession of the premises conveyed; although he would not be a competent witness to support the title of his vendee in an action against him for the premises by a third person.

Where deeds of lands embrace premises lying in two counties, and are recorded in only one of them, and it is proved that the originals are lost, *exemplifications* of the records of the deeds are competent evidence to prove the contents of such deeds, in an action of ejectment for the recovery of the premises conveyed, situate in the county where the deeds are not recorded.

To authorise the production of a deposition in evidence, taken under the act to perpetuate testimony, the party must produce *proof* of the inability of the witness to attend at the circuit, and not rely on the *presumption* of such inability arising from the advanced age of the witness.

THIS was an action of ejectment, tried at the Washington circuit, in June, 1828, before the Hon. ESEK COWEN, one of the circuit judges.

The plaintiff shewed title in John Montresor to a lot of land the premises in question, under a deed of partition between the original patentees of the artillery patent, situate in the county of Washington, bearing date in 1765. He then offered in evidence a deposition of Seth Hunt, a resident of the state of Alabama, taken *de bene esse* on due notice; it being admitted that at the time of the trial he was in Alabama. In this deposition the witness testified, that he was acquainted with one of the lessors of the plaintiff, Thomas Gage Montresor, of the county of Kent in England, who was reputed to be son and one of the heirs at law of the late John Montresor, who died, as the witness had been informed and believed, leaving four children his heirs at law, to wit, the said Thomas Gage Montresor, Henry Tucker Montresor, Frances Margaret Montresor and Mary Lucy Mulcaster; that the three last named persons, by deed bearing date 11th August, 1817, conveyed their interest in the premises in question, and in other lands, to Thomas Gage Montresor, who, by deed dated 19th August, 1817, conveyed the same to him, the witness; that the deeds were duly proved before the lord mayor of London, and recorded in the clerk's office of the county of Essex, in this state; that in the month of October, 1818, the trunk of the witness containing the deeds was stolen, and that he has not since recovered the deeds; that the defendant E. Rice was formerly the wife of Noah Howard, now deceased, who, in 1812, was in possession of the premises in question, and disclaimed having any title to the same, and that E. Rice, the widow of Noah Howard, had agreed to purchase the premi-



ses, but failing in making payment, a conveyance had not been executed to her; and that he (the witness) had sold the premises to one Reuben Mussey, and had no interest in the suit, either directly or indirectly. To the admission of this deposition the defendant objected, on the ground of the interest of the witness. The judge ruled that he was interested. The plaintiff then offered in evidence a release to the witness from G. M. Selden and J. D. Selden, two of the lessors of the plaintiff, in whom the title to the premises was claimed to be, from all liability under the covenants contained in his deed, delivered to the witness previous to his examination. The release was executed in the presence of a subscribing witness, and the defendants objected to its being read unless its execution was proved by the subscribing witness. The judge sustained the objection. The attorney for the plaintiffs proved that two releases, executed and witnessed, were handed to him by the releasors, for the purpose of delivering one of them to the witness Hunt, which was done accordingly. The judge held the proof insufficient, and rejected the release and deposition.

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A deposition of Richard Harrison of New-York, taken under the act to perpetuate testimony for the purpose of proving the descent of the heirs of John Montresor, was next offered in evidence, and as preliminary to its introduction, a witness was called, who proved that Mr. Harrison was between 75 and 80 years of age, and that the witness believed, from the ill state of his health and the infirmities consequent upon his advanced age, he was unable to attend at the circuit as a witness. He had not, however, seen Mr. Harrison for several years, and did not personally know the state of his health. The judge decided that the proof of the inability of Mr. Harrison to attend court was not sufficient, and rejected this deposition also.

The plaintiff next offered in evidence *exemplifications* of the deeds mentioned in the deposition of Hunt, obtained from the clerk of the county of *Essex*, in whose office the same had been duly recorded; the deeds conveying, besides the premises in question, a large tract of land situate in the county of *Essex*. To the admission of the exemplifications the defend-

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ants objected, and the judge rejected them. The plaintiffs gave in evidence a deed of the premises in question from Seth Hunt to Reuben Mussey, bearing date 13th November, 1819, in which the grantor covenanted to defend the title against all persons lawfully claiming the same from or under John Montresor or his heirs, or from or under him the grantor. Also deeds of the same premises from Mussey to George Selden, dated 3d November, 1820, and from George Selden to George M. Selden, bearing date 22d September, 1825. No further proof being offered, the judge nonsuited the plaintiff; to set aside which, a motion was now made.

*D. Selden*, for plaintiff.

*J. L. Wendell*, for defendants.

*By the Court*, SAVAGE, Ch. J. It is objected to the competency of Seth Hunt to testify as a witness in this cause, that he is interested, having conveyed the premises in question to Mussey, through whom the lessors of the plaintiff derive title, with a covenant of warranty. The warranty is against all persons claiming under himself or Montresor; to whom the lot in question was conveyed on a partition among the original proprietors. This covenant was intended to protect Mussey against any claims under an older or better title than Hunt had conveyed. In the suit for the recovery of the possession of the land by his grantee, Hunt had no interest. He could neither be a gainer or loser by the event; nor could the verdict be given in evidence for or against him. Had the vendee of Hunt gone into possession under his conveyance, and an action had been commenced *against* him for the premises by a third person, Hunt could not have been a witness to support the title of his vendee. (2 Rolle's Abr. 685.) But here the action was *by* the vendee to obtain possession; and a failure in the suit could by no possibility subject Hunt to liability, as he would not be liable under his covenant though it had appeared that he had no title when he conveyed; his liability attaching only in case of an *eviction* after possession obtained. (11 Johns. R. 122.) The

objection, if any, went to his credit, and not to his competency. He was therefore a competent witness.

If right in this conclusion, it becomes unimportant to decide whether the release was properly excluded or not. However, according to the established rules of evidence, where an instrument under seal is executed in presence of a subscribing witness, that witness must be produced if within the jurisdiction of the court. If the release had been necessary, the judge was correct in requiring the production of the subscribing witness.

Hunt being considered a competent witness, he proves the existence and loss of the deeds necessary to vest the title in himself, and proves the contents by reference to the exemplifications. Strictly the judge was correct in excluding the exemplifications as *records*. The title should be recorded in the county where the land lies, and then the exemplification of a deed is evidence without accounting for the non-production of the original. In this case, having proved the former existence of the deeds in question, and their loss, the plaintiff was at liberty to give parol evidence of their contents. This he did do, and more also. He produced the only copy which could be produced; and in my judgment it was competent evidence to go to the jury.

The deposition of Hunt, in construction with the deeds produced and those lost, seem to me to make out a *prima facie* case for the plaintiff. The judge was correct in my opinion in rejecting the deposition of Mr. Harrison. For aught that appeared, he might, although 80 years of age, have attended the court. At all events, the judge was not bound to presume him unable to attend. The plaintiff should not rely upon presumption where it was his duty to produce proof.

I am accordingly of opinion that the nonsuit be set aside, and a new trial granted, with costs to abide the event.

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POUCHER vs. HOLLEY, sheriff of Columbia.

A bond for the limits, given by a defendant who had been charged in execution, and to whom the plaintiff had previously given permission to go at large, beyond the jail liberties, does not revive the judgment, so that an action can be maintained against the sheriff for an escape.

Although it was not the intention of the plaintiff to discharge the debt, a voluntary discharge by a creditor of his debtor from the limits discharges the judgment and the debt.

THIS was an action of debt against the defendant, as sheriff of the county of Columbia, for the escape of a prisoner in execution, tried at the Columbia circuit, in September, 1827, before the Hon. WILLIAM A. DUER, one of the circuit judges.

The plaintiff had a judgment against one Reuben Ranny, on which he caused a *ca. sa.* to be issued, by virtue of which Ranny was arrested previous to its return, to wit, the first Monday of January, 1823, by James Warren, then sheriff of Columbia. On the 1st January, 1823, Ranny was assigned as a prisoner in execution by Warner to Samuel E. Hudson, his successor in office, who, on the 2d January, 1826, assigned him to his successor, the defendant in this cause, and Ranny on the same day gave to the defendant a bond for the limits, conditioned that he would remain a true and faithful prisoner, &c. on the said *ca. sa.* at the suit of the plaintiff. When the bond was required from Ranny he rather demurred; but upon being told by the sheriff that he had been assigned to him as a prisoner in execution, and that he must give the bond, he answered that he had been discharged by Poucher, and did not consider himself a prisoner, but to oblige the sheriff, he would execute the bond for formality's sake. An escape was proved on the 9th March, 1827, and the issuing of a *capias* against the defendant was shewn.

On the part of the defendant, it was proved that in the month of April, 1824, the plaintiff told a witness that he had given permission to Ranny to go where he pleased, and that he (the witness) might so inform Ranny; and that in July or August, 1825, in a conversation between the plaintiff and Ranny, on the latter asking the plaintiff why he kept him *here*, (meaning on the limits,) the plaintiff answered, "I do not keep you here, and I have told you so long ago." Ranny replied, "Why do you not go, then, and inform Rogers, the jailer, so that he need not be all the time bothering me;"

and the plaintiff rejoined, "What use is that, Colonel? Go where you please now."

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There was a mass of testimony as to Ranny's going, from time to time, beyond the limits, which had been altered after his first committal. He insisted that he was entitled to the liberties as they existed when he was first arrested, and would not regard the new limits. It also appeared that he was willing to have it believed that he was a prisoner on the limits, saying to a witness, who remarked to him that he was beyond his bounds, that he was not obliged to keep the limits; that Poucher had discharged him; but adding, "You know how it is; there are some little debts against me, and I don't want to be bothered with them." The judge charged the jury that although Poucher discharged Ranny from the limits while Hudson was sheriff, yet if Ranny afterwards voluntarily executed the limit bond to the defendant, the defendant was liable for any escape subsequent to the execution of that bond; that if they were of opinion that Ranny did not execute the limit bond voluntarily, but at the time claimed his exemption and discharge, and denied his liability to imprisonment, still, unless they were fully satisfied that Poucher had discharged him from the limits, they must find for the plaintiff; and they must be satisfied that Poucher intended, at the time alleged, to give Ranny a legal discharge from the debt, or else the defendant was liable. The jury found for the plaintiff for the amount of the debt. A motion was now made to set aside the verdict.

*A. L. Jordan*, for defendant.

*E. Williams*, for plaintiff.

*By the Court*, SUTHERLAND, J. The learned judge appears to me to have erred in two particulars; 1. In stating that a voluntary execution of the limit bond to the defendant by Ranny, after he had been discharged from the limits by Poucher, the plaintiff, would constitute him a prisoner to the defendant, so that the defendant would be liable for any subsequent escape. 2. In stating, that although the jury might be satisfied that Poucher had discharged Ranny from the lim-

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its, still, *unless they were also satisfied that he intended, at the time alleged, to give Ranny a legal discharge from the debt*, the defendant would be liable. In *Powers v. Wilson*, (7 Cowen, 276,) the court says, it is well settled that if a creditor gives his debtor, who is in execution permission to go at large beyond the gaol liberties, *the judgment is discharged*, and the plaintiff can neither issue a new execution, *nor maintain an action for the escape against the sheriff*, and the following cases are cited in support of the position; Barnes, 205; 2 East, 243; 7 T. R. 420; 6 T. R. 525; 5 Johns R. 364; 11 id. 476; 2 Johns. Ch. R. 430; 16 Johns. R. 183; 1 Barn. & Ald. 597; in all of which the same doctrine is clearly and distinctly advanced. If the judgment is discharged the bond for the liberties subsequently given is a mere nullity; it has no efficacy independently of the judgment, and that cannot be revived and restored by the giving of a new bond for the limits; not only the judgment but the debt is gone. No matter what the actual intention of the plaintiff in the execution may have been, the judgment of law is, that a voluntary discharge of his creditor from the limits discharges the judgment and the debt. In almost all the reported cases it appears affirmatively that nothing was more remote from the intention of the plaintiffs than to discharge their judgment, or in any manner impair their security. In *Yates v. Van Rensselaer & Schermerhorn*, (5 Johns. R. 364,) the defendants covenanted and agreed that the plaintiff might re-take them on the same execution or issue a new execution against them and confine them until the debt and costs were paid; and yet it was held, that as the plaintiff had given them permission to go beyond the gaol liberties, *the debt was discharged*, and the arrest of the defendants was illegal and amounted to false imprisonment. A new trial must therefore be granted.

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## PURDY VS. AUSTIN.

ERROR from the Yew-York common pleas. Austin sued Purdy in the common pleas to recover for work, labor and services performed by the plaintiff as a *cartman* for the plaintiff, a *house-builder*, or contractor for the building of houses, &c. The declaration besides the count for work, &c. contained the usual money counts. The defendant pleaded the general issue and the statute of limitations. The plaintiff replied a new promise. The cause was referred, the bill of particulars or items containing 150 folios. A report was made by the referees in favor of the plaintiff for \$213.63. A motion was made to the common pleas to set aside the report, which was heard on a statement made by the referees, (accompanying their report) containing their views of the evidence and of the law of the case, and affidavits on both sides. The motion was denied, but the court ordered the report and all the papers brought before them to be attached to the record, to be removed into the court should the defendant think proper to prosecute a writ of error. In addition there was a stipulation of the parties, that such papers should be sent up to this court. A writ of error was sued out.

The suit was commenced in March, 1827; the last item in the bill of particulars is of the date of 16th August, 1820. From the statement and affidavits it appears that the plaintiff was employed by the defendant as a *cartman* for several years, and particularly during the years 1818 and 1819. He was engaged in the defendant's employment for 18 months in the business of carting. The principal question, however, arises upon the evidence of a new promise, which depends upon the testimony of a single witness. His testimony is detailed in the affidavit of the attorney for the defendant below

sent the bill himself?" and added that he never had a bill from him, that he would not settle with any one but him, that he did not owe him any thing, or any thing worth mentioning; that he had paid him a great deal of money, a horse and the use of a house, and appeared much surprised and signified that he had paid the plaintiff all his work amounted to, (the account being for work alleged to be done.) It was held, that the declarations of the defendant instead of amounting to a recognition of a subsisting demand, were a denial of the pretended claim of the plaintiff.

The acknowledgment of a defendant to take a case out of the operation of the statute of limitations, must be an unequivocal and positive recognition of a subsisting claim in favor of the plaintiff; it must be an admission of a previous subsisting debt which he is liable and willing to pay; and must not be accompanied by circumstances repelling the presumption of a promise to pay the debt.

When a defendant on an account being presented to him after looking at it, threw it down in a passion and said "I owe him (the plaintiff) no such money," or asked, "I owe him so much money as that? Why did he not pre-

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and in the statement of the referees. The attorney represents him as saying, that about a year and a half before the reference, he was furnished by the plaintiff with an account, and requested to present it to the defendant; that he did so; "that the defendant looked at it, and then threw it down in a passion, and said, 'I owe him so much money as that? Why did he not present the bill himself? I never had a bill from Austin. I won't settle with any one but him.' On being cross-examined, he testified that at the same time Purdy said he did not owe him any thing, that he had paid him a great deal of money—a horse and certain rent; that he seemed much surprised at the bill, and signified that he had paid him all his work amounted to; that all this conversation took place at the same time." In the statement of the referees, this witness is represented as having testified that, on presenting the account, Purdy said "that he owed Austin no such money; that he asked why Austin did not present the account himself, and said he had never had any account from Austin; that he would settle with no one but Austin; and that he had paid Austin a good deal of money; he had also paid him by a horse sold, and also by rent of a house; and he did not believe he owed him any thing, or any thing worth mentioning."

*J. C. Barker & J. Anthon*, for plaintiff in error, cited 18 Johns. R. 511; 6 Johns. C. R. 290; 11 Serg & Rawle, 16; 12 id. 396.

*E. T. Pinckney & J. W. Gerard*, for defendant, cited 4 Esp. N. P. Rep. 46; 16 Johns. R. 330; Cowper, 548; 5 Burr. 2630; Peake's N. P. Cases, 93; 2 T. R. 762; 3 Esp. N. P. Rep. 157; 5 Maule & Sel. 75; 6 Johns. R. 267; 10 id. 35.

*By the Court*, MARCY, J. The statement of the referees was regarded by the court below as exhibiting the facts proved on the hearing. By this statement no other question raised in the cause is presented but that which relates to the statute of limitations.



This statute has been looked upon in times past with disfavor by the courts in England, and their example has been too generally followed in this country. Construction formerly went far towards depriving defendants of all the benefits designed for them by it. A different and better view of this salutary statute has been since taken, and a more correct and liberal construction is now given to it. Defences under it are not now regarded, as they once were, discreditable, or at least are not so viewed to the same extent as formerly. It is assuming, as it was intended it should always have had, the character of a "*statute of repose*." If the more recent decisions in relation to the effect of acknowledgements are to be sustained, defendants may speak of dormant claims preferred against them without necessarily losing the benefits of this law.

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As courts have been latterly receding from the positions taken by them in the construction of this act, and as we regard this movement as correct, it will be unnecessary to look at any but the latest decisions for authorities upon the present case.

A demand to which the statute applies is as entirely barred as one from which a debtor has been discharged under an insolvent or bankrupt law. The pre-existing moral duty is no stronger in the one case than in the other; but a demand barred by such a discharge, cannot be revived without an express promise to pay. This court, in the case of *Sands v. Gelston*, (15 Johns. Rep. 511,) considered a debt to which infancy is a bar, or from which a debtor has been discharged under an insolvent law, in the same situation as a debt barred by the statute of limitation. It would seem, therefore, to be reasonable that as much should be required to give vitality to the one as to the other. The court did not, however, propose to adopt the same rule of construction in relation to the acknowledgments of debts barred by an insolvent discharge, as that which had been applied to debts barred by the statute of limitations, nor did they feel at liberty, considering the decisions made here and elsewhere, to require as much to revive a debt barred by the statute as one

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barred by an insolvent discharge. We do not mean in this case to go farther than this court has gone on other occasions; but I have alluded to the difference (in relation to what is required to receive them by way of acknowledgments) between a debt barred by a discharge under an insolvent law and one within the statute of limitations with a view to shew that we should not hesitate to recede quite as far as this court has done in any case from these decisions, which have gone a great way towards overthrowing that statute.

The unqualified and unconditional acknowledgment of a debt, made by a party within six years before suit brought, is adjudged in law to imply a promise to pay; but an acknowledgment of its original justice, without recognizing its present existence, is not sufficient. The language used by the party is to be interpreted according to the meaning and intention of the speaker; and any thing going to negative a promise, is to be regarded as qualifying every other expression used by him. (15 John. Rep. 519. 2 Washington's C. C. 514. 11 Wheaton, 309.)

The general doctrine on this subject, as laid down by the supreme court of the United States in the case of *Bell v. Morrison*, (1 Peters' U. S. Rep. 351,) is, that if there be no express promise, and one is to be raised by implication of law from an acknowledgment, such acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt, which the party is liable and *willing* to pay. If the accompanying circumstances repel the presumption of a promise or intention to pay; if the expressions be equivocal, vague and indeterminate, leading to no certain conclusion, but at best to probable inferences which may affect different minds in different ways, they ought not to go to the jury as evidence of a new promise to revive the cause of action. To allow them to be submitted to a jury for that purpose would, according to the apprehensions of that court, open all the mischiefs against which the statute was intended to guard innocent persons, and expose them to the dangers of being entrapped in careless conversations and betrayed by perjuries. (1 Peters' U. S. Rep. 351.)

These are the general rules of interpreting and construing acknowledgments in regard to reviving demands barred by

the statute of limitations. Let them be applied to the case before us. The testimony on this point is brief. It is that of a single witness, and relates to what passed at a single interview. When the plaintiff's bill was presented by his agent to the defendant, he threw it down in a passion, and said, as the referees state the evidence, he "owed the plaintiff no such money ;" or, as it is detailed in the affidavit, he asked, "I owe him so much money?" He also asked why the defendant did not present the account himself. He said he had never had a bill from him, and would settle with no one but him. On his cross-examination, the witness represented the defendant as saying at the same time that he did not owe the plaintiff any thing, or any thing worth mentioning ; that he had paid him a good deal of money ; had paid him by a horse sold, and also by rent of a house. These declarations of the party were accompanied by others, not noticed in the statement of the referees, but alluded to by the judge who gave the opinion of the court below, and which I think are not to be disregarded, because they somewhat qualify those expressions of the defendant which have been construed into a direct acknowledgment of the plaintiff's debt. The witness further stated that the defendant seemed to be surprised at the bill, and signified that he had paid the plaintiff all his work amounted to.

Do these declarations, of the defendant, taken altogether, fairly import an acknowledgment of a subsisting demand that he was liable and willing to pay ? Are they not accompanied with circumstances that repel the presumption of a promise to pay ? He expressly stated that he did not owe the plaintiff any thing, or any thing worth mentioning. He signified to the witness that he had paid the plaintiff all that his work amounted to, and stated the manner of payment. To my mind, the tenor and purport of the whole conversation was a denial, by no means equivocal, of the pretended claim of the plaintiff. While I entertain a high respect for the learned judge who gave the opinion of the court below in this cause, I am obliged to dissent from his interpretation of the defendant's language. I can hardly understand from the defendant's expression that he owed "*no such money*," taken in connection

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with his other declarations, that he admitted he owed *something* to the plaintiff. I cannot satisfactorily infer, as the learned judge did, that the defendant by asking the question, "Why does not the plaintiff present the bill himself?" and by remarking, that "he would settle with no one but him," he admitted that the plaintiff has some claim to present—that there was some debt due to be settled.

I regard these expressions, and the others used by the defendant, to adopt the language of Mr. Justice Story in the case of *Bell v. Morrison*, as "equivocal, vague and indeterminate, leading to no certain conclusions, but at best to probable inferences, which may affect different minds in different ways." If there is any certainty about them, and any satisfactory inference to be drawn from them, it is that which the plaintiff's agent and witness drew, that the defendant thereby signified that he had paid all he owed for the labor charged in the bill.

The acknowledgment of the defendant certainly does not amount to an unequivocal and positive recognition of a subsisting claim in favor of the plaintiff; and we cannot, in my opinion, sustain the judgment below without abandoning some of the positions that I have before laid down as well established by the late decisions on this subject, and going back to those which have been repudiated and censured as effecting almost a virtual repeal of the statute of limitations.

Judgment reversed.

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v.

T. PALMER vs. VANDENBERGH and CHAPMAN, overseers of the poor of the town of Coxsackie. Vandenberg.

THIS was an action of *assumpsit*, tried at the Columbia circuit, in September, 1827, before the Hon. WM. A. DUEB, one of the circuit judges. Paupers must be supported, since the 27th November, 1824, by the county in which they happened to be on that day, although previous to the passage of the act of the legislature of that date, the legal settlement of such paupers was in another and different county.

In October, 1816, a *written* contract was entered into between the plaintiff, residing in the town of Hillsdale, in the county of Columbia, and one John Thompson, then an overseer of the poor of the town of Coxsackie, in the county of Greene, for the support and maintenance of a pauper chargeable to Coxsackie, by which the plaintiff was to receive \$45 per annum for such support; the first annual payment to be made on the 1st December, 1817. This contract was entered into by the overseers on the foot of an order of a justice of the peace of the town of Coxsackie, reciting the pauper to be chargeable to that town, and stating the annual allowance to be made to the plaintiff for the support of him but omitting to give a direction to that effect. The plaintiff provided for the pauper up to February, 1827, the time of the commencement of this suit, when it was admitted the defendants were overseers of the poor of Coxsackie. On the 5th March, 1825, the defendant Chapman, who was then an overseer of the poor of Coxsackie, paid to the agent of the

the overseers of the poor of the town bound to provide for him, and such contract was rescinded on the 5th March, 1825, leaving the pauper still residing with such person, who continued to support him until February, 1827, and then brought an action against the successors of the overseers of the poor, with whom the contract was originally made, it was held that the action would not lie, there being no promise either express or implied to pay for the support of the pauper.

And it seems that, under the provisions of the act of 1824, the town in which such pauper happened to be on the day of the passage of the act, would have no right of action against the town where the former settlement of such pauper was.

An order of the justice of the peace, authorizing an annual allowance for the relief of a pauper, is authority sufficient to an overseer to contract for the support of such pauper. A formal adjudication of the settlement of the pauper in such case is not necessary.

Overseers of the poor may make contracts, within the scope of their authority, which are binding upon them in their official capacity, and upon their successors in office; which successors are liable to be sued for a non-performance of the contracts of their predecessors.

It seems, that an order of a justice authorizing the expenditure for which a recovery is sought, is not necessary to the maintenance of an action against an overseer upon an express promise.

A contract for the support of a pauper for an indefinite time may be rescinded by the overseers; and where no objection is made, as to the particular time of its termination, it may be put an end to at any time.

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plaintiff the annual payment then due, and sent a written notice to the plaintiff that the town of Coxsackie would not pay for the support of the pauper after that day: and subsequently, on the 3d April, 1826, there was paid to the plaintiff the sum of \$12, when he gave a receipt in full for the support and maintenance of the pauper to the 5th March, 1825. This payment was made and received so as to leave the question of the defendant's liability under the contract unembarrassed as to the portion of time intervening between the 1st December, 1824, and the 5th March, 1825, when the notice was given that the town of Coxsackie would no longer pay for the support of the pauper. During the progress of the trial, several questions of law were raised which were not decided by the presiding judge, but reserved for the opinion of this court. It was insisted by the defendants that the order of the justice directing provision to be made for the pauper, and the contract of the overseers in pursuance thereof, were inadmissible in evidence without the production of an order of one or more justices of the peace of the county of Greene, *adjudging* the pauper to be chargeable to the town of Coxsackie, and *ordering* provision to be made for him; that *one* overseer could not bind himself and his co-overseer without the concurrence of such co-overseer; and that the contract in this case being prospective and for an indefinite period, was beyond the scope of authority of the overseers. The jury found a verdict for the plaintiff for \$78, subject to the opinion of this court.

*A. L. Jordan*, for plaintiff. The contract made by the overseers of Coxsackie, in 1816, was binding upon their successors, being made officially and within the scope of the authority of the parties contracting. (5 Cowen, 359.)

It was not incumbent upon the plaintiff to shew a justice's order authorising the relief granted the pauper; nor was he bound to inquire whether an order was made. (15 Johns. R. 281.) And the successors of the overseers making the contract, having adopted it by paying the stipulated price for several years, are equally bound with their predecessors.

The contract was good although made by but one overseer. Where power is delegated to several for the performance of a public trust, the execution of the trust may be by a majority. (Coke Litt. 181, b. 3 T. R. 592. 6 id. 388. 6 Johns. R. 39. 7 Cowen, 526, note.) The consent of the overseer not acting may be presumed from his acquiescence. Besides, the statute relative to the poor, (1 R. L. 287, § 25,) contemplates a several exercise of the power of the overseers in cases like this, and such has been the universal usage.

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The defendants could not rescind or put an end to the contract, without removing the pauper from the town of Hillsdale. At the making of the contract with the plaintiff; the town of Hillsdale had the power of removing the pauper to the town of Coxsackie; by a statute subsequently passed in November, 1824, (Statutes, vol. 6, p. 382 c. § 8,) that power was abrogated. The plaintiff is liable to the overseers of Hillsdale, on the ground that his act in taking the pauper had cast a burden on them which they had not the power to remove; (15 Johns. R. 436; 18 id. 419;) and consequently, the plaintiff being liable to the overseers of his own town, the defendants could not rescind the contract without removing the obligation which he had incurred.

*L. Bronk & E. Williams*, for defendants. The contract made with the plaintiff was not obligatory upon the defendants; there having been no adjudication as to the settlement of the pauper, or order providing for his support. The fact of the defendants having acted under the contract, is no reason for enforcing it against them after they gave notice of their intention no longer to be bound by it. The contract was for an indefinite time, and therefore not obligatory. Overseers of the poor cannot make a contract binding a town *pro futurum*, nor beyond the term of their own continuance in office. Their successors are liable for debts accruing in the previous year, and may pay them without order; but for expenses accruing during their own time, they are not authorised to expend money without a previous order. But if the contract was obligatory, the defendants had a right to rescind it. This necessarily must be so, or the contract would continue where the inducement to it totally failed; as if the

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pauper, by the inheritance of property, became able to support himself, or if the town to which he had been a charge by any other means became relieved from his support.

The town of Coxsackie was so relieved, by the act of the legislature referred to on the other side. The pauper was no longer one of the poor of Coxsackie, and the town was no longer liable for his support. The county of Columbia became bound to support him. Being in that county at the passage of the act of 1824, he could not be removed to Coxsackie, which is in another county. The authorities cited by the counsel for the defendants were 1 R. L. 279, § 25; 15 Johns. R. 281; 18 id. 122; 5 Cowen, 312, 644, 654; 6 id. 279, 280; Statutes, vol. 6, p. 382 c. § 8.

*By the Court*, SAVAGE, Ch. J. It was objected on the trial that the contract should not be given in evidence, unless the plaintiff shewed an original order of one or more justices of the county, adjudging the pauper to be chargeable upon the town of Coxsackie, and ordering the overseers to provide for and maintain him. The 25th section of the act for the relief and settlement of the poor, (1 R. L. 287,) directs, that when any poor person belonging to any city or town shall apply for relief to an overseer, such overseer shall apply to a justice of the peace, and the justice and overseer shall enquire into the circumstances of such person, &c. and the justice shall make an order for a weekly or other allowance. The acts of the overseer and justice in making the allowance are sufficient evidence of the settlement of the pauper. The order thus made is a sufficient voucher for the overseer in the settlement of his accounts, for so much money as he shall pay under it; and such order, of course, is an authority for the overseer to contract for the support of the pauper to the extent of such order. The statute does not require a formal order in such a case, adjudging the settlement of the pauper to be in such town. The order in this case, though not very formal, is an order from the justice authorizing an annual allowance of \$45; and no objection was made to the fulfilment of the agreement, till since the passing of the act of November 27th. 1824.



It was also objected that the agreement was not binding, because made by only one overseer, and because it was indefinite. Both these objections come with an ill grace, after the contract has been annually confirmed, by a compliance with its terms, for more than nine years, and particularly as the order of the justice has never been revoked or modified and therefore the payment of the money perfectly justified. The liability of overseers of the poor is a subject of much delicacy as well as difficulty. The several towns as well as counties in this state are corporations to a certain extent; and their officers, who have in trust the various interests of the town, are considered corporators so far as to enable them to perform their duties and to execute their trusts. In the language of the late chief justice, (Spencer,) "There can be no doubt that where a public office is instituted by the legislature, an implied authority is conferred on the officer to bring all suits as incident to his office which the proper and faithful discharge of the duties of his office require. (18 Johns. R. 418.) There can be as little doubt that the overseers of the poor, having in their hands or subject to their control, under the sanction of a justice, the funds of the town appropriated to their particular department, have authority to make contracts which are obligatory upon them. So long as they contract within the scope of their authority, their contracts are valid and obligatory upon them in their official capacity, and upon their successors; but if they transcend their powers, though they may be individually responsible, their successors are not.

In *King v. Butler*, (15 Johns. R. 281,) an overseer was held responsible upon his *absolute promise* to pay, without shewing any order of a justice. It was held to be the duty of the overseer to procure the order, as his authority for granting relief; and, of course, in the absence of all evidence on the subject, as every public officer is presumed to have done what was his duty to do, he is presumed to have obtained the order previous to his furnishing relief, or making a promise to that effect. In that case, the legal as well as moral obligation upon the officer to afford assistance was held

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a sufficient consideration. If, therefore, an overseer contracts absolutely to support a pauper, without an order for that purpose, he is responsible personally. In the case of *Olney v. Wickes*, (18 Johns. R. 124,) the defendant evidently did not intend to become personally liable: his expressions were all guarded, and throughout he contracted as the agent of the town. The court on that ground decided that he was not liable, as he was out of office when the suit was brought. It does not appear in that case whether an order had been made or not. That was a case of paupers sent by an order of removal from Saratoga to Schaghticoke, of which latter town the defendant was an overseer. In *Todd v. Birdsall*, (1 Cowen, 260,) Birdsall had paid money for an overseer of the poor of the town of Cortland, on the written request of the latter, to defray the expenses of one of the paupers of that town; and it was held that the defendants, Todd and McCord, who were the successors of the officers who had made the contract, were liable for the official contracts of their predecessors. This must be sound, or there must often be a failure of justice. The person in office contracts as trustee of the fund raised or to be raised by the town; the person contracting goes out of office; he is not personally liable, because he contracts as a public officer, and not in his private capacity; and for another reason, viz. because he has no longer any control over the funds of the town which are appropriated to meet the contract. Those funds have passed into the hands of his successor, by virtue of the directions of the statute. That successor, therefore, having the means in his hands, and representing the same interests of the town in reference to which his predecessor contracted, and having succeeded to the office with all its duties, rights and responsibilities, is the person upon whom the duty devolves of fulfilling the contract; and in case of non-performance, against whom an action should be brought. I know of no case which controverts these principles. The cases of *Gourlay v. Allen*, (5 Cowen, 644,) and *Flower v. Allen*, (id. 564,) and of *Minkler v. Rockfeller*, (6 id. 276,) prove that overseers are not liable upon an *implied* assumpsit for articles furnished or services rendered for the paupers of their towns, not at the re-

quest of the overseers. These cases do, indeed, establish the necessity of an order of a justice, but there is nothing in either of them overruling the case of *King v. Butler*, where the want of an order was held no excuse for the non-fulfilment of an express promise; but it is cited with approbation by Spencer, senator, in 5 Cowen, 664, with this remark: "There the overseer expressly directed the attendance, and promised to pay for it, and the court very properly held that it was his business to see that he was duly authorized." In *Gourlay v. Allen*, (id. 652,) his honour the chancellor cites with approbation the case of *Todd v. Birdsall*, saying that for a clear debt the successors would be liable. If these principles are correct, it follows, 1. That the contract between the plaintiff and Thompson, overseer of Coxsackie, was valid; 2. That it was authorized by the order of a justice, within the scope of the overseer's authority, and therefore binding upon him personally, so long as he continued overseer, but no longer; 3. That it is obligatory upon the defendants, as overseers of the town of Coxsackie.

It was contended upon the argument that the contract, if valid, was rescinded or determined by the notice of the 5th March, 1825. To this it is answered, that the defendants could not put an end to the contract without taking back the pauper. This seems to be reasonable; but the question is one of strict legal right. As the contract was for no definite period, unless perhaps by construction for one year, either party was at liberty to put an end to it at the end of the year. And as no objection was made by the plaintiff as to the particular time of its termination, it seems to me the contract was determined at the time when the plaintiff received his pay up to the 5th March, 1825, as of that date, as it appears that the object of the defendants was to leave the question of liability unembarrassed, and it was so understood by the plaintiff. If the law of 1824 had not been passed, the parties would have been left as they were when the contract was entered into. The plaintiff was under no obligation to support the pauper. On application to the overseers of Hillsdale, they would have sent the pauper to the town of Coxsackie, and there would have been an end of the matter. But by the 8th

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section of the act to provide for the establishment of county poor houses, passed November 27th, 1824, it is enacted, that no person shall be removed as a pauper from one town to another, except as between towns in the same county, but that the county where any person shall become sick, &c. shall support him. This act was in force when the contract in this case was determined; the town of Hillsdale, therefore, could not remove the pauper, but was bound to provide for him. Whether the town has any remedy over against the plaintiff does not appear in the case, nor was it necessary that it should so appear, as I do not see how that fact could affect the question between these parties; as in the late case of *Gourlay v. Allen*, (5 Cowen, 644,) the principle seems to be established that *overseers* are not liable, unless there has been an express promise to pay, or the services for which compensation is asked have been rendered at their request. The case as it is now presented, is like that of *Minklaer v. Rockefeller*, (6 Cow. 280.) The plaintiff has provided for a pauper belonging to the town of Coxsackie, but not at the request, either express or implied, of the defendants; they are therefore not liable.

There is another ground of defence, that by the act of 1824, the pauper in question became chargeable to the town of Hillsdale, and therefore Coxsackie is not bound to provide for him at all.

I cannot believe that such a result was intended by the legislature. The act of 1813 is not repealed any further than that some of its provisions are virtually repealed by being inconsistent with the later act. The act of 1813 proceeds upon the principle that *every town* shall support the poor who have a settlement there. The act of 1824, on the contrary, proceeds upon the principle that *every county* shall support all the poor who become such within its bounds; retaining the old law as to the duties of the several towns with each county. The legislature were not aware, probably, that every town did not keep their poor at home. The act of 1824 is prospective in its terms, but no provision is made for returning poor who were out of their own town when the act was passed. As therefore no provision is made for returning the

pauper in question, nor for supporting him at the expense of the town where he was settled, but a declaration was made, "that the county where such person shall become sick, infirm and poor, shall support him," the consequence is, that Coxsackie becomes discharged of the burthen and it is thrown upon Columbia county, and of course upon Hillsdale. This is unjust, but the injustice should not be charged upon the legislature, as it is to be remembered that the town of Hillsdale might, under the law of 1813, have sent the pauper home. Not having done so, they must bear the burthen thrown upon them by their want of vigilance, and the change of the general system of relieving the poor. I am of opinion that the defendants are entitled to judgment.

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#### Judgment for defendants.\*

\* The question alluded to in the above opinion of a suit *by one town against another*, upon a state of facts similar to the above, arose and was decided during the present term, in the cause of *The Overseers of the Poor of the town of Mamakating v. The Overseers of the Poor of the town of Deerpark*. Two paupers belonging to the town of Deerpark, in Orange county, were kept and provided for by the overseers of Deerpark, in the town of Mamakating, in Sullivan county, during the years 1823 and 1824, and up to the first of April, 1825. In September, 1824, the overseers of Deerpark were applied to, to take away the paupers, but refused. In the fall of 1825, the paupers were carried to Deerpark, the overseers refused to receive them, and the persons bringing them were threatened with a prosecution. The paupers returned to Mamakating and were provided for by the overseers of that town, who expended \$152 in their support, and then bought their action against Deerpark to recover back the money thus expended. A verdict was taken for the plaintiffs under the direction of the presiding judge at the circuit, the Hon. JAMES EMOTT, who expressed his opinion that the plaintiffs were entitled to recover. This court, for the reasons assigned in the above case, set aside the verdict, and ordered a new trial, costs to abide the event.

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PUTNAM vs. MAN.

A plaintiff who is a *constable* may serve a summons in his own favor, issued by a justice of the peace; and his return cannot be impeached in an action of *trespass* for an arrest under an execution, issued on a judgment rendered on the return of such summons. If the return be false, the remedy is by action against the constable for a *false return*.

THIS was an action of trespass and false imprisonment, tried at the Saratoga circuit in November, 1827, before the Hon. REUBEN HYDE WALWORTH, then one of the circuit judges.

The false imprisonment complained of was an arrest on 3d August, 1827, on an execution issued by a justice of the peace, in a suit in a favor of the present defendant against the plaintiff, on which he was detained in custody about two hours, when he paid the amount thereof. It appeared in evidence that on the 9th July, 1827, Man being a *constable*, procured from a justice of peace *two* summonses in his own favor against Putnam, both returnable on the 21st July; Man called on Putnam and told him he had a summons for him and showed it to him. Putnam said he was clear of that, he had taken the benefit of the act. Man asked to see the discharge, which was handed to him, and after reading it said the summons was of no use, and added something about letting the suit drop, and handed the summons to the plaintiff. He then went away and returned the other summons to the justice with an endorsement thereon, purporting that it had been personally served by him on the 10th July 1827, charging \$1,44 fees, and signing the same as *constable*. On the return of the summons, judgment was rendered by the justice in favor of Man, Putnam not appearing. The execution on which Putnam was arrested was issued by the justice at the particular request of Man. On the trial of the cause the evidence in relation to the issuing and return of the summons was objected to by the plaintiff, and the evidence relative to the service and what took place at the time thereof was objected to by the defendant. The evidence however was received, and the questions of the law reserved for the opinion of this court. The judge charged the jury that under the questions reserved they must consider Man as having the right to serve the summons in his own favor; that if they were satisfied that the summons returned to the justice was actually

served, the defendant was entitled to a verdict; but if the defendant had served only the summons which he left with the plaintiff, and that it was left with him for the purpose of deceiving him, and that the plaintiff had never seen or heard of the summons which was actually returned, it would be their duty to find for the plaintiff, subject to the opinion of this court upon the questions reserved. The jury found a verdict for the plaintiff, with \$35 damages.

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*J. Ellsworth*, for plaintiff. A constable cannot serve process where he is a party, and charge fees for such service. It is contrary to the principles of the common law that a party should execute process in his own favor, and therefore when a sheriff is a party the process must go to a coroner; and if he too is interested, then to elizors. The statute also, regulating proceedings in justices' courts, contemplates that the service of process shall be by officers, not parties to the process. (Statutes, 6 vol. 279 c. § 10, 15, 19, 24, 26.) Were it allowable to a party plaintiff to serve process, the practice might operate most injuriously to defendants.

The evidence of the false return was proper. The want of jurisdiction of the justice might be shewn. Although the return upon the summons might protect the justice, and any officer acting under his authority, it cannot have that effect as it respects the defendant who made the false return. (19 Johns. R. 39. 1 Peters' U. S. R. 340.)

*Trespass* may be sustained against the party doing the illegal act, though *case* might be the proper form of action against an officer acting innocently. (1 Chitty's P. 184, 5.)

*M. T. Reynolds*, for defendant. The act of the defendant in serving the summons must be regarded as the act of any other officer who might have done the service. The action is for false imprisonment on the *execution*, and in it no inquiry can be made as to the regularity of the service of the *summons*. If the party has a cause of complaint on that ground, he should have distinctly charged the fact in a direct action, and not sought to examine into it collaterally. (10 Johns. R. 138. 14 id. 481. 1 Phil. Ev. 313, n. a. Cow-

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en's Tr. 275. 1 Wend. 126, 143.) The defendant as constable had a right to serve the summons. (2 Cowen, 437.) And because he has such right it does not necessarily follow that he can execute all other process in a suit in which he is a party. Allowing he could not charge fees for the service of the summons, that does not affect the judgment and execution for the arrest under which the action is brought.

*By the Court, SUTHERLAND, J.* Two questions arise in this case: 1st. Whether a plaintiff, being a constable, can legally serve a summons in his own favor? 2nd. Whether the return upon the summons can be impeached in this action?

The first question was decided in the case of *Tuttle v. Hunt*, (2 Cowen, 436.) It was there held that a plaintiff in a justice's court might serve his own summons, either where he is himself a constable, or is specially deputed for the purpose, in analogy to the case of a *capias*, where no bail is required, which may be served by the sheriff when he is plaintiff, or by any other plaintiff by special deputation. (4 Johns. R. 486, *Bennet v. Fuller*.)

I am inclined to think the constable's return upon the summons was not traversable in this action. The return, though false, gave the justice jurisdiction of the person of the defendant; for the act, (Statutes, vol. 6, 280 c. § 8,) provides that the constable serving the summons shall, upon the oath of his office, return thereupon the time and manner of executing the same, and sign his name thereto: and in case the defendant does not appear at the time and place appointed in such summons, and it shall appear by the return endorsed thereon that the summons was personally served, the justice shall then proceed, &c. The return of the constable is the evidence upon which the statute authorizes and requires the justice to proceed. He must therefore obtain jurisdiction of the defendant's person by virtue of the return; and the judgment which may be subsequently rendered will protect the magistrate, the party, and the officer who may be instrumental in enforcing it. The constable's return is con-



clusive against the defendant in the cause in which it is made. He cannot traverse the truth of it by a plea in abatement or otherwise; but if it be false, the defendant's remedy is in an action against the constable for a false return. (*Wheeler v. Lampman*, 14 Johns. R. 481. *Parmington on Small Causes*, 21, 2, 3. *Cowen's Tr.* 274, 5. *Wilson v. Executors of Hunt*, 1 Peters, 441.)

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The want of jurisdiction in a court rendering a judgment may be shown collaterally whenever any benefit or protection is sought under the judgment. It renders the judgment *coram non judice* and void; and in case of a limited and special jurisdiction, the magistrate and all others concerned in enforcing the judgment would be trespassers. (*Bigelow v. Stearns*, 19 Johns. R. 39. 15 Johns. R. 121. *Elliott v. Pearsall and & others*, 1 Peter's U. S. Rep. 340.) But where the court has jurisdiction, and the proceedings are regular on the face of them, trespass will not lie. (1 Chitty's Pl. 184. *Warner v. Shed*, 10 Johns. R. 138. 1 Wendell, 126.) That the individual who made the false return was the plaintiff in the suit, cannot, that I perceive, alter the case. The party injured has a perfect remedy by an action for the false return; or, if the defendant acted wilfully and corruptly, he might probably be punished criminally, on an indictment for a misdemeanor. (*Parmington*, 21, 2. *Cowen's Tr.* 274.)

The defendant must have judgment

#### LOOMIS vs. SWICK.

THIS was an action of *slander*, tried at the Madison circuit, in March, 1828, before the Hon. NATHAN WILLIAMS, one of the circuit judges.

In an action of slander it is unnecessary to preface each count with all

the inducements and allegations contained in the first; a reference in the second count to the allegations in the first is sufficient.

Where, in the first count of a declaration in slander, it was alleged, in the introductory part of it, that the plaintiff was a merchant, which was omitted in the second and third counts, but the words were alleged to have been spoken in another discourse of and concerning the plaintiff "in his business of a merchant, and of and concerning his said books of account which he kept with his customers and others, as such merchant as aforesaid," it was held, that the reference to the first count was sufficient to cure the defect.

A plaintiff is not bound to prove all the words as laid in the declaration; if he proves some which are laid and which are actionable, it is enough.

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The declaration contained three counts. In the inducement to the *first* count, it was stated that at the time, &c. and long before, the plaintiff was a *merchant* buying and selling goods, wares and merchandize; and as such merchant kept honest, just and true books of account with his customers. The count then proceeded to set forth the speaking of the words which were charged to have been spoken in the *second* person. The *second* count charges the words to have been spoken "of and concerning the plaintiff in his trade and business of a merchant, and of and concerning his said books of account, which he the said plaintiff kept with his customers and others, as such merchant as aforesaid." The words were, "He keeps a false book; he keeps dishonest books; he keeps false accounts; he keeps dishonest accounts; he keeps false account books; Loomis keeps false books; 'Squire Loomis keeps false books; Mr. Loomis keeps false books; Tom Loomis keeps false books; Loomis books have been proved false before 'Squire Van Doozer; Loomis' books have been blacked." The introductory part of the third count is similar to that of the second. The defendant pleaded the general issue and a special plea of justification.

The first witness called being about to relate a conversation between the defendant and himself respecting the plaintiff, when the plaintiff was not present, and in which the plaintiff was spoken of in the *third* person, as *he*, &c. the counsel for the defendant objected to his testimony, on the ground that there was no averment in the second or third counts that the plaintiff at the time, &c. was a *merchant*; nor was there any reference in those counts to that part of the first count which alleges that the plaintiff was a merchant. The judge overruled the objection, and received the testimony. Several witnesses were called, and many, though not all of the words laid in the declaration, were proved. Many words were proved not charged to have been spoken. The jury found a verdict for the plaintiff, with \$125 damages; which was now moved to be set aside.

G. C. Bronson, (attorney general,) for the defendant. All the evidence in the case applies to the second and third counts, in neither of which it is stated that the plaintiff, at the

time of speaking the words, was a *merchant*; nor is there an express reference to the inducement of the first count, wherein it is admitted that such allegation is made. Each count in a declaration must be perfect in itself, or, if it depends upon a former count, it must expressly refer to it. (1 Chitty's Pl. 381, 397.) The words were not proved as laid.

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*J. A. Spencer, contra.*

*By the Court, MARCY, J.* Defects in a count are not aided because such count is found in a declaration with another count that is not defective: each must shew a sufficient cause of action. But in declaring in actions of slander, it is unnecessary and unusual to preface each count with all the inducements and allegations contained in the first. Such a mode of declaring would justly merit censure, as leading to useless prolixity and expense. The counts which follow the first, wanting the necessary allegations, will not be cured by the first, if they do not refer to the allegations contained in the introductory part of the first, where these allegation are necessary to be stated to show a cause of action. The objection to the second and third counts of the declaration in this case is, that it is not averred in either of them that the plaintiff was a *merchant*. Unless the plaintiff sustained that character the words uttered by the defendant are not actionable. It is not disputed but that a proper reference in these counts to the first count would have removed the objection. There is, in my opinion, such reference. It is stated in each of them that the defendant in another discourse spoke and published of and concerning the plaintiff "in his trade and business of a merchant, and of and concerning his said books of account which he kept with his customers and others, as such merchant as aforesaid," &c. This is a sufficient reference to the inducement in the first count, wherein the plaintiff is stated to have been a merchant at the time of uttering the slanderous words, to cure the defect. This precise mode of declaring appears to have received the express sanction of this court in the case of *Mott v. Comstock*, (7 Cowen 654;) and it is in conformity to the precedents in Chitty's Pleadings, (vol. 3, p. 260.)

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There is also an objection raised on this motion of a variance between the words stated in the pleadings and those proved on the trial. This objection does not appear to have been made at the trial, and therefore cannot now be considered; for we cannot say that if it had there been raised, it could not have been obviated. Besides, it seems not to be well founded in fact. It is true, words very different from those laid in the declaration were proved; but some of those laid were the same, and they constituted a distinct charge. Enough was proved as laid to sustain the action, and the plaintiff need not prove more. (2 East, 438. 2 W. Black. 790. 2 Saund. 74 b.

Motion for new trial denied.

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BROWN vs. DEAN and ENSWORTH.

A conveyance of land, accompanied by another instrument shewing the conveyance to have been intended as a security in the nature of a mortgage, though absolute in its terms will be considered as a mortgage;

and not being registered or recorded will be adjudged inoperative and void as against a subsequent bona fide purchaser for a valuable consideration without notice.

On an issue in an action of *replevin*, in which the plaintiff to an avowry for rent *pleads*, denying the seisin of the landlord, the demise, the tenancy, and the assignment to the plaintiff evidence that the defendant in replevin holds by virtue of a deed from the grantor of the plaintiff, executed to him as a security for the payment of money, and that the conveyance to the plaintiff was recorded, and the deed to the defendant *not recorded*, entitles the plaintiff and not the defendant to a verdict.

A plea to an avowry that the landlord holds under a title which in law amounts to a mortgage, which has not been recorded, and that the plaintiff holds under the same person from whom the landlord derives his title, by a bona fide purchase for valuable consideration, is good, and a complete answer to the avowry.

Nor does such plea amount to a disseisin, inasmuch as it shews the relation of landlord and tenant does not exist.

The rule, that a tenant shall not plead *nil habuit in tenementis*, applies only where there is a tenancy in fact,

tiff. The defendant Dean avows, and the defendant Ensworth, as his bailiff, makes cognizance in four avowries, &c. differing in form, but agreeing in substance. In the first avowry it is stated, that one Peter W. Dyer being lawfully seized of a good, absolute and indefeasible estate of inheritance in fee simple, of a certain farm in the declaration mentioned, by indenture bearing date 13th March, 1823, for the consideration of \$550, did grant and convey the same to Dean, (the avowant) and to his heirs and assigns forever, whereby Dean became seized, &c. and being so seized, he on the same day demised the same premises, which premises were holden under such demise for three years, ending on the 13th March, 1826, at and under a certain yearly rent, to wit, the rent of \$38,50, payable on the 13th March annually; and because \$38,50 of the rent aforesaid, for one year ending on the 13th March, 1826, was due and in arrear to Dean, he well avows, and Ensworth well acknowledges the taking, &c. and justly, &c. as, and for and in the name of a distress for the rent so due and in arrear, &c.; wherefore they pray judgment and a return of the goods, &c. The *second* avowry is like the first, except that the demise is for ten years. The *third* avowry differs from the others in stating that the deed executed by Dyer to Dean, was an indenture by way of mortgage, and that by an agreement entered into between the parties thereto, the same was to be defeasible upon the payment of \$550, together with the rent reserved and to accrue. The *fourth* avowry is like the second, except that it states, in addition to the facts set forth in the second, an assignment of the demised premises from Dyer to Brown, the plaintiff.

To these avowries the plaintiff put in six pleas. In the *first*, he denies, the seisin of Dean, the demise to Dyer, the tenancy of Dyer, and the assignment of the demised premises to him, the plaintiff. In the *second*, he alleges, that on the 4th April, 1826, Dyer, by indenture for the consideration of \$1345, granted and conveyed to him the farm, which indenture was on the same day acknowledged, and on the 20th April, 1826, recorded in the clerk's office of the county of Otsego; and denying the grant of the premises to Dean, and

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the demise to Dyer. In the *third* plea, in answer to the first avowry, he says, if Dyer did convey to Dean as alleged in the avowry, Dean has not procured the conveyance to be recorded; he then sets forth the making and recording of the conveyance to him, avers himself to be a bona fide and innocent purchaser for the sum of \$1345, actually paid, without notice of the previous conveyance to Dean; and that he entered and took possession of the premises. In the *fourth* plea, in answer to the second avowry, the plaintiff says, that if such deeds were executed between Dyer and Dean, they are not recorded according to the form of the statute; and that on, &c. a deed was executed of the said farm to him the plaintiff, and recorded, &c. as the last plea. In the *fifth* plea, in answer to the second and fourth avowries, the plaintiff says, that if the deed and lease set up in the avowries were executed between Dyer and Dean, they were so executed as a *mortgage* to secure \$550 with interest, to be paid in ten years, and that the same have not been recorded; he then avers the deed to himself, the recording, &c. In the *sixth* plea, in answer to the third avowry, the plaintiff says, that the said indenture of mortgage and lease are not recorded, and that on, &c. he became a bona fide purchaser, &c. without notice, became seised, setting forth the deed to him, its record, and that he entered into possession of the premises.

To the *first* plea the defendants joined issue; to the *second*, *third*, *fourth* and *fifth* they demurred; and to the *sixth* they replied, that the plaintiff, at the time of the conveyance to him, had notice of the previous conveyance to Dean, and that the premises were holden under him by lease, concluding to the country.

The issues of fact joined on the *first* and *sixth* pleas were tried at the Otsego circuit in September, 1827, before the Hon. SAMUEL NELSON, one of the circuit judges. On the trial it appeared that on the 13th March, 1823, Peter W. Dyer having borrowed of the defendant Dean \$550, executed to him an *absolute deed* of the farm on which the *distress* in this cause was made, and took back a *lease* from Dean for the term of ten years, in which was reserved an annual rent

of \$38,50, and which contained a covenant that on the repayment of the \$550, with the interest or rent reserved, that Dean should re-convey the farm to Dyer. Neither of those instruments were recorded, it having been agreed at the execution of them that the transaction should be kept a secret. In addition to the conveyance of the farm, Dyer, together with one Farnham, his partner in trade, executed a bond to Dean to secure the payment of the \$550, with the interest thereof. Dyer paid the interest in 1824 and 1825. On 4th April, 1826, Dyer, for the consideration of \$1345, paid or secured to be paid by negotiable notes, conveyed the farm to the plaintiff, which conveyance was duly recorded; notice of the previous conveyance to Dean, and of the lease from Dean to Dyer, not being brought home to the plaintiff. On the 13th May, 1826, Dyer and Farnham having failed, Dean made a distress for the rent, which became due on the lease on the 13th March preceding; for the taking of which distress this action was brought.

The evidence shewing the nature of the transaction between Dyer and Dean was objected to on the trial by the defendants; because, 1. In an action of replevin, the tenant is not allowed to dispute the title of his landlord under which he has entered into possession; 2. That the plaintiff having entered under Dyer, is estopped by the indenture of lease executed to him by Dean; 3. That the relation of landlord and tenant having been shewn to exist between Dean and Dyer, and the plaintiff having entered under Dyer, though by an absolute conveyance in fee in law, must be regarded as the tenant of Dean; 4. That the evidence offered substantially went in support of the pleas which were demurred to; and 5. That the issue joined upon the *sixth* plea was an immaterial issue, and ought not to be tried. The judge decided he would receive the evidence, subject to the opinion of this court on a case to be made; and after the evidence was closed, the jury, under his direction, found for the defendants on the *first* issue, and assessed the damages at \$42,75; and for the plaintiff on the *sixth* issue, subject to the opinion of this court.

The cause was argued by

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*D. Andrus*, for plaintiff, and

*J. A. Collier*, for defendants.

The following cases were cited: For the plaintiff, 1 R. L. 370, § 4; id. 373, § 3; 1 Chitty's Pl. 506; Archb. Pl. 342; 8 Johns. R. 108; 14 id. 204; id. 555; 2 Cowen, 324; 2 Atk. 275; 3 Vesey, 478; 2 Johns. C. R. 182; 5 Cowen, 135; 7 id. 450. For the defendants, 3 Common Law Rep. 167; 1 Holt, 489, n.; 1 Chitty's Pl. 561; 2 Wils. 208, n.; Ld. Raym. 1550; Strange, 817; 7 T. R. 539; 10 East, 350; 4 Maule & Sel. 347; 5 T. R. 4; 2 Ves. jun. 696; 1 Johns. Cas. 90; 16 Johns. R. 110; 5 Cowen, 123; 7 id. 325, 637; 4 id. 722; Sugden on Vend. 524; 16 Johns. R. 289; 20 id. 61.

*By the Court*, SAVAGE, C. J. At the circuit there were two issues to be tried, viz. on the first and sixth pleas. The judge directed the jury to find the issue on the first plea for the defendants: they did so, and assessed the damages at \$42,75, and under his direction also they found the issue on the sixth plea for the plaintiff, subject to the opinion of this court. We are now called upon to render judgment upon this verdict; I will therefore state the several findings of the jury.

Upon the first issue they find (to negative the plea) that William Dean was seised as averred in his avowries, and leased the premises to Dyer, who held the same as tenant to Dean; and that the plaintiff Brown held as the assignee of Dyer, and as tenant to Dean, and they assessed the defendant's damages to \$42,75; and upon the sixth issue they find that the indenture by way of mortgage, and the indenture of lease given by way of defeasance, mentioned in the third avowry, were never recorded according to law; that Dyer being in possession, and claiming to be seised in fee simple, the plaintiff having no notice of said deed and defeasance, on the 4th April, 1826, became, and was the purchaser bona fide of said premises from Dyer, for the full value thereof; and that Dyer and wife conveyed to him, and his deed was recorded, by which he became seised in fee of the said premises.



From the facts as proved on the trial, the case is simple and plain. By the *act concerning deeds* (1 R. L. 370, § 4,) every deed and conveyance of lands in certain counties of this state, (among which is Otsego county, where the premises are situated,) after the 1st February, 1799, shall be adjudged fraudulent and void, against any subsequent bona fide purchaser or mortgagee, for valuable consideration, unless the same be recorded in the clerk's office in said county, before the recording the deed or conveyance under which such subsequent purchaser or mortgagee shall claim. By the *act concerning mortgages*, (1 R. L. 373, § 3,) every conveyance which appears by any other instrument to have been intended as a security in the nature of a mortgage, though it be absolute in its terms, shall be considered a mortgage, and liable to be registered as other mortgages; and that it shall not have the advantages given to mortgages unless the defeasance be also registered.

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The conveyance from Dyer to Dean, though absolute in its terms, being accompanied by a writing operating as a defeasance, according to the statute last cited, must be considered as a mortgage between the parties; but not being registered as a mortgage, was inoperative and void as against the plaintiff, who was a bona fide purchaser for valuable consideration. The first issue in fact, therefore, which was found for the defendants, should have been for the plaintiff; Dean having been originally but a mortgagee, and never seised in fee of the premises, nor did the legal relation of landlord and tenant exist between Dean and Dyer; much less did it exist between Dean and the plaintiff Brown. Whether it is competent for a mortgagor and mortgagee to create between them the relation of landlord and tenant, and to give the mortgagee a remedy by distress for the interest or principal, it would be useless to enquire, because the question here is not between those parties. Conceding therefore, for the sake of argument, that it may be done, (on which question however, I give no opinion,) the rights of these parties would not be affected by it; for though the deed and defeasance operated between the parties as a mortgage, yet as between

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the plaintiff and Dean, the supposed mortgagee, those instruments are of no more force than mere blank paper. Dean has his remedy against Dyer on his covenant to pay, and against Dyer and Farnham upon their bond, but there is no lien or charge upon the land. The moment Dyer conveyed to Brown, the plaintiff, and his title was perfected by the recording his deed, all the previous conveyances by deed and lease became nullities, and, as respects this cause, have no existence in fact. The jury should have been so instructed, and instead of finding that Dean was seised and leased the premises to Dyer, who thereby became tenant, and that such tenancy attached to Brown, the plaintiff, the issue should have been found for the plaintiff; and as the verdict was taken subject to the opinion of this court, the finding of the jury will be corrected on the record.

The plaintiff is clearly entitled to judgment upon the facts as they appeared in evidence. But as they appear upon paper in the form of a demurrer book, they are, by the ingenuity of the pleaders, so involved in the mazes of special pleading, that a considerable portion of patience and perseverance has been found necessary to disentangle them. [The Chief Justice here enters into a minute examination of the pleadings, and then proceeds as follows:]

One general demurrer is put in to four pleas, and special causes are assigned to each, which, however, all involve the main question, viz. whether the deed and lease executed between Dyer and Dean, taken together, constitute a mortgage, and if so, then as the mortgage was not registered or recorded, and as the plaintiff had not notice of it previous to his purchase, whether it is valid as against him? On the part of the defendants it is contended that Dyer was Dean's tenant, and that the plaintiff purchasing from the tenant, comes into his place, and is estopped from denying title in Dean.

It is contended by the defendants that the *second* plea is bad because it does not traverse the demise in the first avowry, but attempts to introduce a collateral issue. Whatever in pleading is not denied is admitted; but a party pleading may admit the facts stated in the pleading which he professes to answer, and then aver matter in avoidance. So here, the

plaintiff might say, I admit that the deed and lease set forth in the avowry were executed, but they were never recorded, and subsequently I became a bona fide purchaser for valuable consideration. The latter facts are a complete answer to the avowry, and shew that there was no tenancy as to the plaintiff, or as to the premises after his connection with them. This is also an answer to the objection that the pleas shew a disseisin of the landlord by the tenant. By the allegation of the sale to himself, the recording of his deed, and that if any such papers were executed as are set forth in the avowries, they were not recorded, all ideas of landlord and tenant and demised premises vanish. The same facts are an answer to the objection that *nil habuit in tenementis* is a bad plea, and that the lease being by indenture is an estoppel. If the lease was a valid instrument as to the plaintiff, these objections would be conclusive. In the case of *Sullivan v. Stradling*, (2 Wils. 208 to 218,) the subject was much discussed, and the conclusion of the court was that such a plea is bad. But the tenant may deny the demise; and even if the pleas were bad which deny the title in Dean, there would be enough left to destroy the alleged right of distress. But my answer to these objections is, that those rules are applicable to cases of real tenancies; that if they can be enforced here, they virtually repeal the statutes; that here nothing like a tenancy exists.

I am of opinion, therefore, that though these pleas may be informal, yet they are substantially good, and that the plaintiff is entitled to judgment upon the demurrers and the whole record.

Judgment for plaintiff.

Justices SUTHERLAND and MARCY did not hear the argument, and gave no opinion.

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A surety for the payment of rent to a landlord, who engages, in case of default by the tenant, to make up the deficiency, and fully satisfy the conditions and agreements of the tenant, without requiring notice of non-payment or proof of a demand being made of the tenant has no right to call upon the landlord to *distrain* the tenant's goods, and is not exonerated from his covenant, though the landlord, on request, refuses so to do.

ERROR from the New-York common pleas. Holden sued Ruggles in the court below in an action of covenant, and *declared* on an instrument under seal, bearing date 3d May, 1826, executed by Ruggles, attached to another executed by one Grove Goodrich. Goodrich had hired of Holden certain rooms in a dwelling house in the city of New-York, for the term of one year from the 1st May, 1826, at the yearly rent of \$150, payable quarterly, and covenanted to make punctual payment of the rent, in manner aforesaid, and to surrender the premises at the expiration of the term in as good state and condition as reasonable use and wear thereof would permit, damages by the elements excepted. Underneath this covenant, Ruggles subscribed another covenant, acknowledging that for and in consideration of the letting of the premises, he had become surety for the punctual payment of the rent and performance of the covenants to be paid and performed by Goodrich; and if any default should be made therein, he promised and agreed to pay unto Holden such sum or sums of money as would be sufficient to make up such deficiency, and fully satisfy the conditions of the agreement, without requiring any notice of non-payment or proof of the demand being made. The plaintiff averred that Holden made default in the payment of a quarter's rent due the 1st February, 1827, and demanded the same of the defendant. The defendant *pleaded* that on the 10th February, 1827, he requested the plaintiff to proceed immediately in the collection of the rent then due, by *distraining* a sufficiency of goods and chattels, then possessed, occupied and used by Goodrich in the premises, (which he enumerated, and averred to be in the possession of Goodrich,) to pay the rent, and thereby relieve him (the defendant) from his liability as surety; but that the plaintiff refused so to do, although he well knew that the circumstances of Goodrich were becoming desperate, and that the rent could not be collected of him by any other

process than by distress. He further averred that Goodrich has become and was a bankrupt; wherefore he prayed judgment, &c. The plaintiff demurred, and the defendant joined in demurrer. The common pleas adjudged the plea to be insufficient. The cause was then tried on the plea of the general issue, and the damages of the plaintiff were assessed at \$45,90; upon which a judgment was entered for the plaintiff.

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*P. Ruggles*, for the plaintiff in error. A surety is discharged, where a creditor neglects to collect his debt of the principal, after being requested to do it by the surety, and the debt is lost by such neglect. So it was held in the cases of *Paine v. Packard*, (13 Johns. R. 174,) and *King v. Baldwin*, (17 id. 387;) and this case, it is supposed, comes directly within the principle on which those cases were decided. The principle is general, and is not controlled by the species of obligation by which the surety is bound. The right of the creditor to *distrain* might have been a principal inducement to the defendant in becoming the surety.

*D. B. Shepard*, for defendant in error. A man may, without *consideration*, enter into an express covenant, under hand and seal, to the performance of which, he is at all events bound. (Esp. N. P. 269. 3 Burr. 1637. 2 Ld. Raym. 1477.) Where there is an express covenant, there must be an absolute performance, nor can it be discharged by any collateral matter whatever. (Strange, 763. 5 Cowen, 272.) The defendant covenanted to pay without requiring any effort on the part of the plaintiff to obtain the rent of the tenant; to compel him, therefore to proceed against his tenant was repugnant to the very terms of the covenant, which may have been designed to prevent the necessity of a recourse to any other means of obtaining the rent. Covenants must be construed according to the intent of the parties, and if doubtful, they must be taken most strongly against the covenantor.

By [the Court, SUTHERLAND, J. This case appears to me not to fall within the principle established in the cases of *Paine v. Packard*, (13 Johns. R. 174,) and *King v. Baldwin*,

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(17 Johns. R. 384.) It was there held that if an obligee or holder of a note who is requested by the surety to proceed without delay and collect the money from *the principal*, who is then solvent, refuses or neglects to proceed against the principal, who afterwards becomes insolvent, the surety will be discharged. These cases proceed upon the principle that the creditor is under an equitable obligation to obtain payment from the principal debtor if he is able to pay, and not from the surety, *and that such is the essence of the contract*; and if the creditor, after an explicit request by the surety, refuses to proceed against the principal, and thereby the means of obtaining the debt from the principal are lost, the surety is exonerated. In both those cases the suits were brought upon promissory notes made by two defendants, the one, however, being only a surety; there was no special contract or covenant on the part of the sureties; they merely signed the note with their principal; there is an implied promise or undertaking under such circumstances, on the part of the creditor, that he will prosecute the principal whenever the surety shall request it, and such, as Judge Spencer expresses it, is the essence of the contract. The law adjudges that such was the understanding of the parties.

But where a party enters into a special covenant with a creditor upon a valid consideration, as surety for his debtor, such covenant is to be construed like all other contracts, and the intention of the parties is to be gathered by considering the instrument in all its provisions, and giving to the language employed, its ordinary and natural signification. It is very clear to my mind that it was the intention and understanding of the parties to this contract, that Ruggles should assume the responsibility of seeing that the rent was punctually paid as it became due, without its being necessary for the plaintiffs to take any measures to enforce payment from the tenant, or even to demand the rent from him. I should infer that the very object of the plaintiff in requiring this security was to avoid the necessity of resorting to the unpleasant process of a distress in order to collect the rent. Ruggles expressly covenants, if there shall be any default on the part of the tenant in paying his rent, that he will pay such

sum or sums of money as will be sufficient to make up such deficiency, and fully satisfy the condition of the said agreement, (by the tenant,) without requiring any notice of non-payment, or proof of the demand being made. Here is an unqualified covenant to pay if the tenant is in default for a day, and that without receiving any notice of the tenant's default, or of any demand having been made upon him. The defendant assumed the responsibility of ascertaining for himself whether the tenant paid as his rent became due, and, by his covenant, subjected himself to an action the moment there was a default in payment.

It appears to me that it would be doing violence to the manifest intention of the parties, to hold, that under such circumstances, the defendant had a right to call upon the plaintiff to distrain his tenant's goods, and that because he refused to do so, he had exonerated the defendant from his covenant.

Judgment affirmed.

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LITTLE vs. MARTIN.

ERROR from the New-York common pleas. Martin sued Little in the court below, in an action of assumpsit for *use and occupation* of a house. In August, 1826, it was agreed between the parties that the defendant should take a lease of the house for five years, at the rent of \$300 per annum. A few days afterwards, a clerk of the defendant called on the plaintiff to inquire her name and the number of the house to be inserted in a lease, said the leases would be prepared the next day, and desired the plaintiff to call at the defendant's to execute them. About the middle of August, a servant of the defendant called on the plaintiff to obtain the key of the premises, saying it was wanted to shew the upper part of the house to some person who was about hiring the same. The key was sent to the defendant, and delivered by his orders to his servant. On the 19th December, the plaintiff tendered a lease to the

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Where there is an agreement to demise a house for five years, and leases to be executed, under which the party enters, and subsequently refuses to accept a lease, the owner may maintain assumpsit for the use and occupation.

Taking the key of the house, without a continued actual occupation, is enough to entitle the

plaintiff to sustain the action.

The plaintiff is not bound to sue upon the agreement, and the statute of frauds cannot be objected to a recovery, as the suit is not on the contract.

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defendant, who refused to receive it unless the plaintiff would make certain alterations in the premises, which he alleged she had agreed to have made. It was then agreed that the defendant should surrender the *key* and be released from all claim for coming rent, without prejudice to the plaintiff's claim for rent then accrued. The key was delivered up; the plaintiff let the premises to another person, and brought her suit to recover for the use and occupation of the premises by the defendant.

The defendant moved that the plaintiff be nonsuited; because, 1. No use and occupation had been proved; 2. The plaintiff's claim, if any, was for a breach of the contract in not accepting the lease, there being no lease, but only an agreement for a lease; and 3. The agreement being by parol for a lease for five years, it was void by the statute of frauds. His honor, the first judge of the common pleas, denied the motion; and the jury, under his direction, found a verdict for the plaintiff for \$37.50. The defendant excepted to the decision, judgment was entered for the plaintiff, and a writ of error sued out.

*W. P. Hawes*, for plaintiff in error. No occupation of the premises by the defendant below was shewn. The *key* was kept, and the defendant entered, if he may be considered as having entered under the agreement for a lease, which did not create the relation of landlord and tenant. (13 Johns. R. 489. 6 id. 46.) The defendant's occupation, if so it may be called, was under the agreement; and that being by parol for five years, is void, and will not sustain an action. The law will not imply a promise where there is an express agreement. Where a tenant enters under an agreement for a lease before the lease is executed, the lessor cannot dstrain; for there is no demise, either express or implied. (2 Taunton, 148.)

*P. A. Cowdrey*, for defendant in error. By statute, (1 R. L. 444,) a landlord may recover a reasonable satisfaction for tenements held, in an action for use and occupation, where the agreement is not by deed. The question on the motion for a nonsuit was, whether there was any evidence proper to



be submitted to a jury, from which a tenancy could be inferred. The possession passed by the delivery of the key. (1 East, 194. 2 Johns. R. 56. 5 id. 344.) Having the control of the premises, it was optional with the defendant to occupy if he chose. It has been expressly decided, where there was an agreement to demise, but not amounting to an actual lease under which the party entered, the owner might maintain assumpsit for the use and occupation. (4 Esp. R. 59; Peake's N. P. 192; recognized in 13 Johns. R. 299.) Having entered upon the agreement for a lease, the defendant could not object the statute of frauds.

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*By the Court, MARCY, J.* If there is any error in this case, it is embraced in the first objection. As to the second, it is disposed of by the statute; for it expressly provides that if an agreement not by deed appears, the plaintiff shall not be nonsuited, but may use it to shew the amount that he is entitled to recover; and to the third, it is a sufficient answer to say, the action is not upon the contract; it has nothing to do with the suit any further than that the proof of it, though not made as the statute requires, establishes the fact that the defendant below went into the occupation of the premises, if in truth he did occupy them, by the permission of the plaintiff. This fact it was incumbent on the plaintiff to prove; and it is as well proved by shewing an entry under a void contract as under a valid one.

The exception is taken to the decision of the judge on the motion for a nonsuit: and the only question is, whether he erred in ruling that there was sufficient evidence to carry the cause to the jury. To sustain an action for use and occupation, actual occupation is not indispensably necessary. Rent in this form of action has been recovered where there was no actual occupancy by reason of the premises being burnt down, (4 Taunt. Rep. 45,) and also where the defendant has actually deserted them; and that too after the plaintiff had said to him he might quit if he pleased. (2 Campb. 103.) Taking the key, and entering into the premises without a continued actual possession, would be a sufficient use and occupation to enable the plaintiff to recover. The facts

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proved by the plaintiff below would warrant the jury in finding an occupancy by the defendant in this case, and the judge therefore decided correctly in refusing the motion for a nonsuit.

Judgment affirmed.

JACKSON, ex dem. BURHANS and wife, vs. ELMENDORF.

Where a testator, in disposing of his property by will, gives three portions of his estate to three of his children in fee, and a fourth portion to a fourth child for life with remainder to her issue in fee, and then adds a clause in these words: "Item. I do further will, order and direct, that if any of my children named Jacob, Catharine and Helena, or if the issue of my said daughter Maria should happen to die without lawful issue, that such part of my said estate before devised to such deceased, shall descend to the survivors or survivor of the devisees above named in equal parts; or in case of the death of any of them leaving lawful issue, to the representative or representatives of such deceased such share as would have descended to such deceased, in equal parts;" it was held, that the estate devised to Catharine and Helena, on their decease, went to the issue of Maria, and not to Maria herself, although a specific devise in fee was made to her, besides the devise for life.

THIS was an action of ejectment, tried at the Ulster circuit in November, 1826, before the Hon. SAMUEL R. BETTS, then one of the circuit judges..

The question in this case depends upon the construction to be given to the last will and testament of Jacob Ten Broeck, under which the lessors of the plaintiff claimed to recover. The will is dated 19th August, 1793. By it the testator gave the use and occupation of all his estate, real and personal, to his wife Gerritje during her widowhood, and upon her re-marriage or decease, he disposed of his estate as follows: To his son Jacob, he gave in fee a certain farm and certain articles of personal property; to his daughter Maria, the wife of C. Burhans, he gave *in fee* a lot of ground adjoining a lot he had previously conveyed to her and her husband, and he also devised to her, *during life*, two small lots, one containing about six, and the other nine acres of land; and upon the death of his daughter Maria, he devised the two last mentioned lots "unto such issue as shall be born of her in lawful wedlock, in equal parts; or in case any such issue as shall be dead, leaving lawful issue, unto such child or children surviving such issue of my said daughter Maria, such share as would have descended to his, her or their deceased father or mother in equal parts, and to their and each of their respective heirs and assigns forever." The testator also made a specific bequest of

personal property to his daughter Maria. To his daughters Catharine and Helena, as tenants in common, he devised *in fee* his homestead farm, together with all the other land he was seised of, and not before devised; and gave them a specific bequest of personal property. The residue of his personal estate he ordered to be divided, upon the decease or re-marriage of his wife, into four equal parts, and bequeathed one fourth unto three of his children, viz. Jacob, Catharine and Helena; and the *remaining fourth* he ordered and directed his executors to dispose of to the best advantage, and the monies arising therefrom to put out at use upon good security, and the annual interest arising therefrom to pay to his daughter Maria during her natural life; and after her death he gave and bequeathed the said principal monies, together with the securities to be taken therefor, unto the lawful issue of his said daughter, in equal parts, and to their respective executors, administrators or assigns. Then came the following clause: "Item. I do further will, order and direct, that if any of my children named Jacob, Catharine and Helena, or if the issue of my said daughter Maria should happen to die without lawful issue, that such part of my said estate before devised to such deceased, shall descend to the survivors or survivor of the *devisées above named*, in equal parts; or in case of the death of any of them leaving lawful issue, to the represtative or representatives of such deceased, such share as would have descended to such deceased, in equal parts."

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The testator died leaving his four children him surviving, viz. Jacob, Maria, (the wife of C. Burhans,) Catharine and Helena. The two last died in the spring of 1826, leaving their brother Jacob and sister Maria them surviving; each of whom were married long before the making of the will, and had issue.

The action was brought by C. Burhans and Maria his wife for the recovery of about six acres of land, devised to Catharine and Helena, and conveyed by them to the defendant by a warranty deed, bearing date 6th May, 1797, since when he has been in possession. A verdict was taken for the plaintiff, subject to the opinion of this court.

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*J. Sudam*, for plaintiffs. On the decease of the sisters Catharine and Helena, the estate devised to them by the will vested in their brothers Jacob and their sister Maria, one of the lessors of the plaintiff, by way of executory devise. (2 Cowen, 335. 6 id. 180.) The provision in the will that the estate of the devisee dying without issue shall go to the survivors or survivor of the *devisees above named*, embraces the lessor Maria, she being by the will a devisee of a portion of the estate of the testator, and therefore coming within the terms of the will. To give a construction to this devise, by which the estate would go to her issue, Maria might be excluded from inheriting the estate of her own children, which would go to their uncle; and in case of the decease of the two sisters shortly after the death of the testator, his intentions in providing for all the children of Maria might have been defeated by the estate going to one or two only, whereas she might afterwards have a number of children, to the exclusion of whom those in life would take on the falling in of the estate. Besides, if the estate goes to the issue of Maria, the equality of inheritance, which the testator intended to establish, will be defeated, as they will take *per capita* and not *per stirpes*; and the son of the testator will take no greater portion of the estate than either one of the children of Maria.

*L. Elmendorf*, for defendant. The expiration of the estate of the widow of the testator is not shewn; consequently in no event can the lessor recover.

By the will, the shares of the devisees dying without issue are given to the issue of Maria, and not to herself. On the death of either of the sisters, Catharine or Helena, the share of the one dying went to the surviving *sister the brother* and the *issue* of Maria, each taking an absolute fee in their respective portions; and upon the death of such surviving sister, Maria would have been entitled to inherit one half of such third, had it not been for the conveyance with warranty from the sisters to the defendant, by which she is estopped from setting up a claim. It is manifest that the testator intended that Maria should not have an estate in the premises by which her issue could be prevented from succeeding to the inheritance.

*By the Court, SAVAGE, Ch. J.* According to the decisions of this court, and of the court for the correction of errors, (16 Johns. R. 382, 20 id. 483, 2 Cowen, 333, 6 id. 180,) the devise in question carried to the survivors, after the death of either of the devisees, by way of *executory devise*, the share of such devisee dying. The only question is, whether Maria takes any thing under the devise over; and if so, how much?

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Whether the testator intended to divide his property equally among his children, we cannot determine; but it is apparent that, between the four parcels which he made of his property, he intended there should be a reciprocity of the chances of enjoyment. It was evidently the intention of the testator in this case to keep his property in his family as long as possible. His son was married and had issue; his daughter Maria was married and had issue. One small lot he had given to her absolutely; the residue for life, and then to her children in fee. The devisees in fee, were his son Jacob, the children of his daughter Maria, and his two daughters Catharine and Helena, and his daughter Maria as to a small lot. Having thus disposed of his property, he introduces the clause which creates the difficulty. What is given to Maria in fee is subject to no limitation. It seems that what he intended Maria should have absolutely he gave her in explicit terms, and should she die without issue, no part of her estate could descend to her brother and sisters by virtue of the devise. The event of Maria's dying without issue was certainly not as probable as that her sisters might so die, who were then unmarried. He seems, therefore, to have intended to make the chances of survivorship as equal as possible.

The policy of our laws tolerates restraints upon the alienation of real estate, provided the limitations do not extend beyond lives *in esse*, at the death of the testator, and 21 years and nine months afterwards. But the property thus taken by survivorship would be free from the restraints imposed by the will, and would be held in fee simple, absolute and liable to be sold. To have given this right of survivorship to Maria, and thus placing this part of his estate at the disposal of herself and husband, would have been doing an act which the testator seems to have studiously guarded against.

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The peculiar phraseology of this devise seems to me to justify the construction which I give to this will. The language of the will is, *that if any of my children, named Jacob, Catharine and Helena ; or, if the children of my daughter Maria should happen to die without lawful issue,* (it will be seen that Maria's name is not mentioned in this devise ; at her death there is to be no survivorship ; the testator had already provided for such an event, by giving her share of the property to her children ; but to pursue this clause in the will :) *that such part of my said estate before devised to such deceased, shall descend to the survivors or survivor of the devisees above named, in equal parts ; or in case of the death of any of them, having lawful (issue,) to the representative or representatives of such deceased, such share as would have descended to such deceased in equal parts.* Here it must be observed, that in this clause of the will Maria is not named as a devisee, and the devise is to the survivors of the *devisees above named*, in equal parts. If the words *above named* refer to the persons named and described as devisees in this clause, then *Maria* is excluded and her children are admitted, provided they are sufficiently described ; if the words *above named* refer to the whole will, then *Maria*, being named as a devisee in the will, must be entitled. But if she is to receive a share, does she take a moiety with her brother, to the exclusion of her children, or do they each take an equal share with their mother and uncle ?

The counsel for the plaintiff contends that *Maria* takes half: 1. Because she is one of the "devisees above named;" and 2. Because otherwise she could not inherit from her own children. It is not supposed by the will that she is to take from her own children ; they are to take from her, and, according to the plaintiff's construction of the will, they can take no part of the estate till her death, of course she cannot inherit from them ; but upon the construction which I have assumed, she may possibly take from her children by devise, though not by inheritance.

The defendant's counsel insists, that for aught that appears, the widow's life estate still exists ; the answer is, that such objection, if well founded, should have been raised at

the trial, and as it was not, it cannot be urged here. He also insists, that upon the death of the first of the sisters, her share descended to her brother and surviving sister and the children of Maria in fee simple, absolute, unshackled by the will; and that upon the death of the survivor of the two sisters, Catherine and Helena, her share of the estate of the sister who first died would go according to the statute of descents, and not according to the will, and that of course Maria would take one half of such third, was she not estopped from asserting her right by the warranty deed of her sister whose estate she claims. Admitting that such conclusion would be correct, which, however, it is unnecessary to determine, it would still leave the question open as to the greater part of the subject matter in dispute.

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The difficulty in my mind is to decide whether by the terms, "*devisees above named*," we are to understand Maria or her children as included. The testator could not have intended both; yet both are devisees in the will. If we confine the designation to the devisees named in the devise, which gives the right of survivorship, then clearly the children alone were intended and are entitled; and this construction seems to comport with the intention of the testator as collected from the whole will. My conclusion, therefore, is, that Maria takes nothing under this devise, and as her children are not lessors, the defendant must have judgment.

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WOODWORTH vs. MCBRIDE.

ERROR from the Monroe common pleas. Woodworth sued McBride in a justice's court, and declared against him in an action of covenant, for that the defendant on the 17th November, 1824, by an instrument under seal, agreed to transport 10,500 barrel staves in a canal boat to Albany as

Where, in a contract relative to the transportation of merchandise on the canal, the dangers of canal navigation are excepted out of a warranty for delivery by a specific time, a plea generally alleging such dangers, without specifying them, as an excuse for non-performance, is not sufficient on special demurrer.

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expeditiously as possible, (the dangers of canal navigation excepted;) provided the ice in the canal and other unforeseen accidents did not prevent, the staves to be delivered in Albany before the 1st January, then next; but if so prevented, then to be transported as soon as the canal navigation opened in the spring. The plaintiff assigned several breaches, amongst others, that the staves were not transported by the 1st January, 1825, nor as soon as the canal navigation opened in the spring of 1825, nor at any time since. The defendant *pleaded* several pleas, amongst others, that he did deliver 8,500 of the staves, and would have delivered the residue but for the dangers of the canal. To this plea the plaintiff replied that the defendant did not deliver the staves as soon as the canal navigation opened in the spring of 1825. The defendant *rejoined* that he did, in the month of December, 1824, deliver 8,500 of the staves according to the contract, and would have delivered the residue but for the dangers of the canal. Plaintiff demurred specially, because the rejoinder does not state in what the dangers consisted; defendant joined. The justice gave judgment for the plaintiff, and the defendant appealed to the Monroe common pleas, who adjudged the rejoinder good, and gave judgment for the defendant. Upon which the plaintiff below sued out a writ of error.

*A. Gardiner*, for plaintiff in error.

*S. Boughton*, for defendant in error.

*By the Court*, SUTHERLAND, J. I am inclined to think that it was the intention of the parties that the defendant should not be responsible for any delay or failure in delivering the staves, either in the fall of 1824, or the spring of 1825; if such failure was occasioned by the dangers of the canal, although the considerations urged by the counsel for the plaintiff to shew that the exception was intended to apply only to the dangers of the fall or winter navigation, are not without some force.

But the defendant, if he could not perform his contract in the fall, was bound to complete it the ensuing spring. Accor-



ding to the fair construction of his rejoinder, however, he alleges that he was prevented from delivering the residue of the staves in December, 1824, by the dangers of the canal, but gives no excuse for not delivering them the ensuing spring. He says that in December, 1824, he delivered 8500 of the staves, according to contract, and would have delivered the residue, (that is at the same time,) but for the dangers of the canal. This is no answer to the replication, nor does it shew a valid excuse for the failure of performance on the part of the plaintiff.

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The rejoinder is also defective in form, in not stating particularly, what the dangers of the canal navigation were, which prevented performance on the part of the defendant. It was a fact resting exclusively in his knowledge, of which he was bound to apprise the plaintiff, in order that he might be able to disprove the allegation, or produce evidence in relation to it upon the trial. In these respects the rejoinder was defective.

I am inclined to think, that testing it by the liberal rules which are always applied to the pleadings in justices' courts, it may be considered a substantial answer in all other respects to all the breaches assigned.

But the plaintiff should have had judgment on the demurrer in the court below, with leave to the defendant to amend his rejoinder.

Judgment reversed.

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COCHRAN VS. SCOTT.

DEMURRER to declaration. The plaintiff declared as the indorsee of a promissory note, payable to Lawrence Power and company, alleging an endorsement by Lawrence Power and company, without setting forth the names of the persons composing the firm. The declaration contained also the common money counts. The defendant demurred to the whole declaration, assigning special causes; the plaintiff joined.

In declaring on a note as the endorsee of a firm, it is not necessary to set forth the names of the members of the firm.

A demurrer to a declaration containing several

counts will not be sustained if either count is good.

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v.  
Kipp.

*R. Lockwood*, for plaintiff.

*H. M. Western*, for defendant.

*By the Court.* MARCY, J. It was not necessary to set forth the names of the persons composing the firm of Lawrence Power and company, they being neither plaintiffs nor defendants in the suit. If the plaintiff derives his title to a note through a *firm*, he is not required to state in his declaration the names of the persons composing it. (8 Wheaton-642. 3 Chitty's Pl. 35.)

There is a still stronger reason, if possible, for overruling this demurrer. The declaration contains several counts, and the demurrer is put in to the whole; the assigned cause of demurrer applies to only one count, and the sufficiency of the other counts is not questioned.

Judgment for plaintiff.

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JACKSON, ex dem. LIVINGSTONS, vs. KIPP.

Where there is a condition of re-entry reserved in a lease for non-payment of rent, the reversioner is not entitled to re-enter without shewing a compliance with the requirements of the common law, such as a demand, &c. or that by statute, he is entitled to re-enter, for the want of sufficient property on the premises countervailing the rent.

THIS was an action of ejectment, tried at the Columbia circuit in April, 1827, before the Hon. WILLIAM A. DUER, one of the circuit judges.

The lessors of the plaintiff claimed to recover a farm for breach of *conditions* contained in an unexpired lease for lives of the premises, bearing date in 1795, executed by the ancestor of the lessors of the plaintiff to the father of the defendant, and under which he claimed title. The condition relied on was, that if the yearly rent (which was 25 bushels of wheat annually) should be behind and unpaid for the space of twenty days after the day appointed for its payment; and that if the lessee, his heirs or assigns should not observe, keep and perform the several covenants in the indenture of lease expressed to be performed by the lessee, &c. the indenture and

A sale under an execution does not entitle the reversioner to demand a fifth of the consideration money under a covenant, that on every sale or assignment such proportion of the purchase money shall be paid to him, if it be bona fide an adversary proceeding on the part of the creditor, and not collusive with intent to defeat the condition in the lease.

the estate thereby created were to be void, determine and cease, and right of re-entry was given to the landlord, his heirs and assigns. One of the covenants in the lease was, that on every sale or assignment of the demised premises by the lessee, his heirs or assigns, he or they should pay to the landlord, his heirs or assigns, a fifth part of the consideration money of such sale or assignment.

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The plaintiff proved, that in May, 1826, the rent due and in arrear amounted to the sum of \$122, and that in April, 1826, the property of the defendant was sold on execution. It appeared that at the time of the sale there was more than double the amount of property on the premises to satisfy the rent; and that property to the amount of \$150, purchased at the sale, was left on the premises, and continued there in the possession of the defendant at the time of the trial of the cause. It was not proved specifically that the estate of the defendant in the demised premises was sold under the execution. On this evidence a verdict was taken for the plaintiff, subject to the opinion of the supreme court.

*E. Williams*, for plaintiff, contended that the decisions of this court in 7 Cowen, 285, and 1 Wendell, 396, placed the law on the subject of conditions on the broad principles of common sense. If a party binds himself to do or not to do an act, and fails in the performance of his engagement, a right of action accrues against him. So if he takes an estate upon condition, and the condition is broken, the real estate is gone.

*A. L. Jordon*, for defendant. The only covenant that it can be pretended was broken, is the covenant for the payment of rent; for a sale under an execution being by operation of law, and not the act of the party, is not within the meaning of the covenant requiring the payment of the *fifth* reserved in this lease, in lieu of the ordinary quarter sale in the ancient leases. To enable the landlord to proceed for condition broken by the non-payment of the rent, he is bound to shew a demand of the rent, of the precise sum due, upon the day when the rent is due and payable, at a convenient

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time before sun set, upon the land and at the most notorious place of it. (1 Saund. 286, n. 16. Woodfall, 337.) If he proceeds under the statute, (1 R. L. 441,) he is bound to shew that there was not property sufficient on the premises to countervail the rent. With none of these requirements of the law did the plaintiff comply.

*By the Court, SAVAGE, C. J.* The plaintiff cannot sustain this action for the non-payment of rent, neither at common law nor under the statute. He cannot recover at common law, because he has not complied with the common law requirements, such as the demand of the precise amount of rent on the day it fell due, at a convenient time before sundown. (7 T. R. 117. 1 Saund. 286, n. 16. Saund. on Pl. and Ev. 470.) Nor can this action be sustained under the statute, because there was abundant property on the premises countervailing the arrears of rent, and which might have been distrained.

Nor can the plaintiff recover for a breach for the non-payment of the fifth of the sale of the premises. The case is rather obscure as to the sheriff's sale in April, 1826. It is not stated that the defendant's interest in the demise d premises was sold; and if there was no sale there could be no forfeiture on that ground. If there was a sale of the premises, then a question I apprehend would arise, whether such sale was *collusive*, or whether it was *bona fide* an adversary proceeding on the part of the creditor. If collusive, and made with intent to defeat the condition in the lease, then the plaintiff would be entitled to recover; but if bona fide, then, according to the opinion of Platt, justice, in *Jackson v. Silvernail*, (15 Johns. R. 279,) such sale does not work a forfeiture; and such was the point decided by this court in *Jackson ex dem. Schuyler v. Cortiss*, (7 Johns. R. 531,) though an intimation to the contrary was thrown out by Mr. Justice Sutherland, in *Jackson v. Groat*, (7 Cowen, 286.) Upon the facts appearing in this case, the defendant is entitled to judgment.

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McKenny.

JACKSON ex dem. Watson, vs. McKENNY.

THIS was an action of ejectment, tried at the New-York circuit, before the Hon. WILLIAM A. DUE, one of the circuit judges.

The lessor of the plaintiff, Sarah Watson, by a deed of bargain and sale bearing date 9th January, 1809, for the consideration of \$1000 expressed in the deed, granted to her sons John C. Watson and Joshua Watson, in fee a house and lot in Harrison street, in the city of New-York; and on the same day an instrument in writing, under seal, was executed by Sarah Watson and by John C. Watson, one of the grantees, reciting the deed and the intention of the parties that the grantor should hold and enjoy the property thereby conveyed, and take the rents and profits thereof during her natural life, and covenanting to abide by such agreement and understanding. On the 10th April, 1811, Sarah Watson executed a lease of the premises to John C. Watson for the term of ten years, reserving an annual rent of \$300. On the 2d July, 1811, John C. Watson executed a mortgage of the premises to Nicholas Gibert, to secure the payment of \$2300, and on the 15th August, 1811, sold and conveyed the house and lot in question to Peter Allaire, by indenture of that date, containing the usual covenants; subject, however, to the mortgage executed to Gibert. The defendant deduced a regular title to him from Allaire. Joshua Watson, the co-grantee of John C. Watson, died, leaving his brother his heir at law. On this state of facts, a verdict was rendered for the plaintiff for a moiety of the premises, subject to the opinion of this court, whether the instrument under which the plaintiff claims is a good and valid instrument in the law.

*J. R. Headley*, for plaintiff, cited 1 Johns. C. 91: 15 Johns. R. 458; 1 Burr. 60, 106; 1 Johns. C. 399; 3 Johns. R.

stand seized to uses.

The instrument also might operate by way of exception or reservation in favor of the grantor.

Where a mother conveyed a house and lot to two sons in fee, and took back an instrument in writing of the same date, executed by one of the grantees under seal, declaring the intention of the parties to be, that the grantor should hold and enjoy the property, and receive the rents and profits thereof during her natural life and covenanting to abide by such agreement, it was held, that the deed and the instrument were parts of the same contract, and that the grantor had an estate for life in the premises. The deed, being founded on a pecuniary consideration, might take effect in futuro; and the defeasance being a part of the deed, and not a distinct instrument, the deed was valid and effectual as a covenant to

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388; 2 Black. Comm. 298; Co. Lit. 225; 1 Burr. 290; Bull. N. P. 156; Cro. Jac. 399; 5 Cowen, 123.

*W. S. Sears*, for defendant, cited 1 Saund. 340; 1 Cowen, 639; 16 Johns. R. 515; 1 Saund. 191; Com Dig. tit. Uses, L. 1.

*By the Court*, SUTHERLAND, J. The plaintiff's right to recover depends entirely on the validity and effect of the defeasance of the 9th January, 1809, from John C. Watson to her. If that was a legal and valid instrument, she had a life estate in a moiety of the premises, and was entitled to recover accordingly. It is contended, on the part of the defendant, that this instrument cannot operate as a bargain and sale, for want of a pecuniary consideration; (16 Johns. R. 515; 1 Cowen, 639; 3 Johns. R. 484; 16 Johns. R. 47;) and that if it can operate at all, it must be as a covenant to stand seised to uses, supported by the consideration of blood, derived from the deed in fee, which was executed at the same time: and that the trustee (the whole fee being in him by the decease of his brother) having conveyed to Allaire, *who had no knowledge of the trust*, the use was destroyed.

It has been repeatedly held that where two instruments are executed at the same time, between the same parties, and relating to the same subject matter, they are to be construed together, and considered as forming but one contract or agreement. This is a familiar doctrine in relation to mortgages and deeds of defeasance. It was fully recognized by Ch. J. Parsons, in *Holbrook v. Finney*, (4 Mass. R. 569.) It is there said, that where a vendor of real estate gives a deed and takes back a mortgage to secure the purchase money, at the same time, the deed and mortgage are to be considered as parts of the same contract, as taking effect at the same instant, and as constituting but one act, 'in the same manner as a deed of defeasance forms with the principal deed to which it refers, but one contract, although it be by a distinct and separate instrument. Upon this principle, a wife is not entitled to dower in lands purchased by her husband, when he gives a mortgage to secure the consideration money at the same time that he receives his deed. The deed and mortgage

are but one contract, and are construed as though they were embraced in the same instrument. Judge Spencer, in *Stow v. Tefft*, (15 Johns. R. 463,) observes, the substance of a conveyance, where land is mortgaged at the same time a deed is given, is, that the bargainor sells the land to the bargainee on condition that he pays the price at the stipulated time; and if he does not, that the bargainor shall be re-seised of it, free of the mortgage; and *whether this contract is contained in one and the same instrument, as it well may be, or in distinct instruments executed at the same instant*, can make no possible difference. In *Jackson ex dem. Trowbridge, v. Dunsbagh*, (1 Johns. Cas. 91,) the doctrine was distinctly advanced and maintained, that several deeds of the same date between the same parties, and relating to the same subject, may be construed as parts of one assurance.

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Construing the deed from the lessor to her sons and the defeasance simultaneously executed by one of them to her, as one instrument, carrying into effect a single contract or agreement, as the preceding cases fully authorize us to do, it is manifest that it was the intention of the parties that the lessor should retain an estate for life in the premises, and that the grantee should have the fee, to take effect after the death of the grantor. The consideration expressed in the deed from the lessor is \$1000; and it is abundantly settled that a deed of bargain and sale, founded on a pecuniary consideration, *to take effect in futuro*, is effectual. This point was expressly decided in *Jackson v. Dunsbagh*, (1 John. Cas. 91,) already cited, and in *Jackson v. Staats*, (11 Johns. R. 351,) *Jackson v. Swart*, (20 Johns. R. 87,) 4 Mass. R. 136, 2 Saunds. 96, n. 1, 4 Cruise's Dig. 185, 193. If the defeasance is to be considered a part of the deed, and not a distinct instrument, then the case of *Jackson, ex dem. Wood and others v. Swart*, above referred to, is precisely in point, to show that the deed was valid and effectual as a covenant to stand seised. (7 Coke, 133. 2 Strange, 934.) Nor do I perceive any objection to its operation, by way of exception or reservation, in favor of the grantor.

Judgment for plaintiff.

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BURTON vs. R. & C. STEWART.

*Fraud*, in the sale of a chattel, cannot be set up in bar of a recovery of a note given on such sale, unless the vendee, on the discovery of the fraud, returns the article purchased to the vendor, or shews it to be entirely destitute of value.

If the vendee retains the property, he cannot treat the sale as void.

Whether the action be brought on the contract or the security, the defendant, on a proper notice, is entitled to give evidence in mitigation of the amount of recovery.

THIS was an action of assumpsit, tried at the Madison circuit in April, 1828, before the Hon. NATHAN WILLIAMS, one of the circuit judges.

The action was on a promissory note given by the defendants to the plaintiff. The declaration contained a count on the note, and also the common money counts. The plea was the general issue. The defendants proved that the note was given as the price of a mare sold to them by the plaintiff, and that the plaintiff was guilty of *deceit* in the sale, having sold the mare as sound as far as he knew, when in fact he knew that she was infected with a disease called the *poll evil*, (of which she died,) which was not discovered until after the sale. This evidence was objected to by the plaintiff as inadmissible under the plea of the general issue. The judge however received the testimony, deciding that if the mare was entirely without value, the evidence was admissible; but if she was of some value, the evidence was not proper. The question of value he submitted to the jury, by charging them that if they should find that the mare was entirely worthless at the time of the sale, they should find for the defendants; but if she was of some value, however small, they must disregard the evidence given by the defendants, and find for the plaintiff. The jury found for the plaintiff the amount of the note. The defendants excepted to the decision and charge of the judge.

*J. A. Spencer*, for the defendants. Fraud vitiates all contracts into which it enters, and renders them void. (Comyn on Contr. 37, 38.) An action therefore could not be maintained on the note. The defendants having received the horse from the plaintiff, were liable on a *quantum valebat*; but there is no such count in the declaration.

It was not necessary to give notice of the defence. Under the general issue, any evidence going to shew that the plaintiff never had a cause of action, or had not a subsisting cause



of action at the commencement of the suit, is admissible, as the want of a sufficient or legal consideration, &c. (1 Chitty's Pl. 470, 471. 1 Ld. Raym. 217.) The rule in Chitty is recognized by this court in 15 Johns. R. 230. Notes obtained by fraudulent representations are utterly void and without consideration. (13 Johns. R. 56.) Fraud may be given in evidence in a defence, and will be an answer to the whole demand, or in abatement of the damages, according to the circumstances of the case. (13 Johns. R. 302.) Fraud or deceit in the subject matter of the consideration of a note is competent proof under the general issue. (8 Cowen, 31.)

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*C. Stebbins*, for plaintiff. In an action upon a contract of sale, the defendant may mitigate the damages by shewing the unsoundness of the article, whether the action be upon a *quantum valebat* or for a stipulated sum. In such case the defence is anomalous. It is not on the principles of set off, for the damages are unliquidated; nor can it be said there is a failure of consideration, because the contract being entire, is upheld if any consideration is left. Fraud vitiates a contract, it is admitted; but a party, to avail himself of such defence, must avoid the contract by returning the property.

Where a bill or note is given, the contract of sale is not in question, and the defence rests upon the consideration. Lord Mansfield says, (2 Burr. 1082,) "there is a distinction between the *contract* and *security*: the former is divisible, the latter not." A *total* want or failure of consideration is an answer to the action on the note, and may be shewn under the general issue; for by such proof it appears, that at the time of the commencement of the suit, there was no cause of action—no valid contract. (11 Johns. Rep. 50, and 15 id. 230.) But the defendant cannot, in such action on the note, mitigate the damages by shewing a *partial* failure of consideration. (1 Camp. 40, n. 2 id. 346. 3 id. 37. 14 East, 486. 5 Cowen, 494. 2 Wheaton, 13. Chitty on Contr. 169.) At all events, such evidence is inadmissible under the general issue. (Chitty on Contr. 169. 11 Johns. R. 547. 15 id. 230. 7 East, 479.) The observation in 8 Cowen must be

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understood as applying to fraud or deceit going to the whole consideration.

*By the Court, MARCY, J.* The defendants contend that there was a total want of consideration for the note, by reason of the fraud practiced in the sale, and that therefore they were entitled to a verdict. The general position that all contracts infected with fraud are void both at law and in equity, is too well settled to be controverted, and too plain to require reference to authorities to support it; and it is not less certain that securities given on such contracts are also void as between the contracting parties. But a party to a fraudulent contract may, however, so conduct himself in relation to it, as to forfeit his right to treat it as void.

Where a bill is given for the price of goods fraudulently sold under a warranty, the breach of the warranty is a bar to the action on the bill, as between the parties to the sale, if the defendant immediately, on discovering the fraud, repudiate the contract by tendering back the goods. (Saund. on Pl. & Ev. 303, 4.) The case of *Lewis v. Cosgrave*, (2 Taunt. 2,) is very similar to the one before us, with this important additional feature, that there the defendant offered to return the horse, but the plaintiff refused to receive him; he was however left in his stable without his knowledge. In that case the fraud in the sale rendered the check given for the horse invalid. In *Leggett v. Cooper*, (2 Stark. N. P. 93,) the action was for hops sold by sample for a stipulated price. The plaintiff put into the sacks hops of a quality inferior to the sample. The defendant paid into court a portion of the sum claimed by the plaintiff, and resisted his recovery beyond that amount, on the ground that the hops were of an inferior quality to the sample. Lord Ellenborough said the defence went to the whole action, and the defendant could not interpose such a defence after paying money into court. He observed that the defendant "had lost the ground of defence upon which perhaps he might otherwise have insisted, *by neglecting to make the objection at the proper time, and return the goods.*" In the case of *Fisher v. Samuda*, (1 Camb. 190.) the same judge stated it to be

"the duty of the purchaser of any commodity, immediately upon discovering that it was not according to order and unfit for the purpose for which it was intended, to return it to the vendor, or give him notice to take it back."

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If the rule of law laid down in the two last cases is applicable to this, the defendants could not treat the sale as void after retaining the property received under it. Had they intended to treat the contract as void on the ground of fraud, it was their duty, when they discovered the mare was not such as the plaintiff had represented her to be, to have returned her to the plaintiff. When prosecuted on the note, and the cause brought to trial, it was too late to repudiate the contract. Saunders applies this rule to a fraudulent sale of goods under a warranty, and there is no reason why it should not be applied to a fraudulent sale where there is no express warranty. Besides, I do not think that in principle a distinction can be made between this case and the cases last cited. On what ground is it insisted that the sale in this case is void? Is it not because the horse delivered by the plaintiff was not such a horse as was represented to the defendants, and as they contracted for? The same remark applies to the hops in the case of *Leggett v. Cooper*, and to the beer in the case of *Fisher v. Samuda*. Not having taken their stand at the proper time, the defendants cannot, at the trial, say that the contract was void so long as they are not able to say that the horse was valueless.

It seems to be well settled, that if the action had been brought for the consideration of the horse, the defendants might have shewn, in mitigation of damages, if they had given notice thereof, that the horse was not such as the plaintiff had represented, and that the representation was fraudulent. There are cases which shew that where the action is on the security the rule is different; but this court, seeing no reason for the distinction, have not regarded it. It has been decided here that the partial failure of the consideration of a note may be given in evidence in a suit on a note between the parties, to it, under a notice to reduce the amount of damages. (2 Wendell, 431.)

New trial denied.

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August, 1829.

Chapman  
v.  
Andrews.

CHAPMAN VS. ANDREWS.

An action of *replevin* will not lie against a *receiptor* of goods taken by virtue of an execution, although the action, under the circumstances of the case, might be maintained against the sheriff, if the party becomes such receiptor at the request or by the consent of the defendant in the execution.

Where two persons were partners as *clothiers*, and took certain cloths, by the consent of the owner, in payment for their work, and divided them between them, and the share of one of them was subsequently taken under an execution against the original owner, it seems the other is an incompetent witness to prove the title of his partner to the cloths thus taken without a release from such partner.

THIS was an action of *replevin*, tried at the Rensselaer circuit in November, 1827, before the Hon. NATHAN WILLIAMS, one of the circuit judges.

William Chapman (the plaintiff) and one Elbridge Green were partners as *clothiers*. In the year 1826, they were employed by one Robert Patterson to dress and finish a large quantity of satinets. In the fall of that year they divided between them 56 pieces of the satinets put into their hands by Patterson, each taking 28 pieces, on the allegation that Patterson was indebted to them in a large sum of money for work done, and had authorized them to retain as much of the satinets as would satisfy their demand. About the 1st January, 1827, the 28 pieces of satinet taken by Chapman, being in a mill of which Chapman and Green were tenants, were levied upon by a deputy of the sheriff of the county of Rensselaer, by virtue of an execution on a judgment of this court against Patterson; and when the deputy was about removing the goods, Green who was present, proposed that Chapman should procure Andrews (the defendant) to become receiptor for the goods. Chapman declined, saying he had no intercourse with Andrews, but told Green he might procure him to receipt the goods if he chose. Andrews was applied to by Green and consented; the goods were carried to Andrews' house, and the plaintiff assisted in their transportation. For this taking of the goods the action was brought.

Green proved the partnership between himself and Chapman, their employment by Patterson, his indebtedness to them, and consent to their retaining as many of the goods as would satisfy their demand, and the subsequent partition of the 56 pieces of satinets between them. He was objected to as an interested witness, whereupon he executed a release to Chapman of all claims he had or might have in conse-

quence of this suit, when, though the objection was persisted in by the defendant, the presiding judge permitted him to testify.

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The defendant moved for a nonsuit on the ground that the goods in question having come to the possession of the defendant by the consent of the plaintiff, an action of replevin could not be maintained. The judge refused to nonsuit the plaintiff, and charged the jury, that it was immaterial whether the goods were committed to the possession of Andrews with the consent or at the request of Chapman or not; that the law regarded the receptor as the agent of the sheriff, and therefore no demand was necessary before suit brought. The jury found a verdict for the plaintiff, which was now moved to be set aside.

A. *Vanderpoel*, for the defendant. The defendant having obtained possession of the goods by the consent of the plaintiff, replevin will not lie. Replevin can be maintained only where trespass will lie. Although the remedy of replevin of late years has been greatly extended, still a *tortious taking* is required to be shewn, or the plaintiff must fail. (1 Wendell, 109.) Even *trover* cannot be brought against a receiptor until after a demand. (9 Johns. R. 361.) The charge of the judge was therefore erroneous.

Green was directly interested. He and Chapman were partners, and, according to his testimony, were joint owners of the 56 pieces of satinets by the consent of Patterson. They made partition, and on the title of Chapman failing, Green would be liable to him under the implied warranty of title, or compellable to account for a proportion of the satinets received and retained by him. The release came from the wrong quarter.

J. P. *Cushman*, for the plaintiff. The goods being the property of the plaintiff and not of the defendant in the execution, under color of which they were taken, the sheriff is liable as a trespasser, and if so, the defendant also is liable. He received the goods from the sheriff, the plaintiff had already been divested, and the receipt was given to the sheriff;

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he was therefore the agent of the sheriff, and not of the plaintiff. The defendant procured the trespass, [the counsel here adverted to some of the facts in the case, shewing that the defendant had probably given information to the creditors of Patterson as to the goods in question, and had acknowledged he had done so in consequence of hostile feelings to the plaintiff,] which is sufficient to support the action against him. (Starkie's Ev. 1445. 2 Phil. Ev. 134.)

Green was a competent witness. One partner may bring an action for *tort* and recover for his own share. The partnership can be objected only by plea in abatement, and if not so plead, the partner may recover in his own name. (1 Chitty, 53. 2 Strange, 820. 1 Montague, 148.) The implied warranty on partition of lands, is a warranty only against the acts of the party himself. Apply that rule to this case, and Greene could not be responsible. Besides, on a partition or division of personal property the law implies no warranty.

*By the Court, SAVAGE, Ch. J.* This case presents two questions: 1. Will replevin lie under the circumstances here disclosed: 2. Was Green a competent Witness? The doctrine of this court I consider as settled, that replevin lies for such a taking as will sustain an action of trespass *de bonis asportatis*. Was the defendant guilty of any trespass? Upon the facts found by the jury, the deputy sheriff was a trespasser in levying on the goods; but in that act the defendant was not concerned, either as a party to the execution or levy. The defendant received the goods as the servant or agent of the officer at the request of the plaintiff; for though the plaintiff himself did not speak to the defendant to become the receiptor, yet Green did, who acted for the plaintiff and at his request, and the plaintiff assisted in carrying the goods to the defendant's house. Would trespass lie under these circumstances? I think not. There was no tortious taking which is necessary to maintain trespass or replevin. Either of these actions would lie against the deputy sheriff who made the levy, and trover perhaps might be maintained against the defendant after conversion. But the defendant did not become a trespasser by receiving the goods at the request of

both parties. Suppose the sheriff had carried the goods from Stephentown to Troy, and there put them in store for safe keeping; would the store keeper who had them in custody be a trespasser? Clearly not. Neither was the defendant.

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2. Was Green a competent witness? The facts proved to shew his interest were, that the plaintiff and Green were partners in dressing cloth, and as such received the cloths in question, and were to have a stipulated compensation for dressing them. Upon this statement of facts, the witness was as much interested as the plaintiff, and should have been rejected. The judge decided that Green was interested. A release was then produced from the witness to the plaintiff, from all claim and demand arising out of this suit, or the subject matter of it. He was then considered competent. But it seems to me there was an interest still remaining, arising out of the situation of those parties. Suppose the plaintiff's title had failed; would not the plaintiff have had a claim against Green, either to contribute to the loss thus sustained on goods which they had divided, the title to the one half of which had failed, or to account to the plaintiff for the one half of the goods which he retained as a compensation for their joint services? I am inclined to think he would have had such claim; and this could only be removed by a release from the plaintiff to the witness.

I am of opinion, therefore, that Green was interested; but whether he was or not, the action of replevin does not lie upon the facts proved in this case.

A new trial must be granted; costs to abide the event.

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August, 1829.

Reynolds  
v.  
Reynolds.

REYNOLDS vs. REYNOLDS, administrator, &c.

A declaration is bad for misjoinder of counts, where in an action of assumpsit against an administrator, a count of *insimul computasent* with the defendant, as administrator, of and concerning monies from the defendant as administrator, to the plaintiff, before that time due and owing, is joined to counts on premises made by the intestate.

Had the accounting been stated to have been with the defendant, as administrator, of and concerning money due and owing to the plaintiff by the intestate in his life time there would have been no misjoinder.

DEMURRER to declaration. The declaration is in assumpsit, and contains seven counts. The first six counts charge *the intestate* to have been indebted, in his lifetime, to the plaintiff; the seventh is on an account stated by the defendant, *as administrator* with the plaintiff, "of and concerning divers other sums of money from the said defendant, *as administrator* as aforesaid, to the said plaintiff, before that time, due and owing." The count states that upon such accounting the defendant, *as administrator* as aforesaid, was found in arrear and indebted; and being so found in arrear and indebted, he, *as administrator*, in consideration thereof, undertook and promised, &c. The defendant demurred, and the plaintiff joined.

*C. Bushnell*, for defendant. The last count is incongruous, and cannot be joined with the other counts in the declaration, because it requires a different judgment than would be rendered upon those counts. The judgment on the first counts would be *de bonis intestatoris*; on the last, *de bonis propriis*. It is not alleged, in the last count, that the accounting was of and concerning monies due or owing *by the intestate*. The defendant, *as administrator*, may have become liable after the death of the intestate, for funeral charges, &c.: the count, therefore, would be good to charge him personally; but a judgment *de bonis intestatoris* could not be rendered upon it. The rule that a plaintiff, upon a general demurrer to the whole declaration, shall have judgment, if there be one good count, does not apply to this case: the demurrer is for the incongruity of the counts. The counsel commented upon the observations of Mr. Chitty, (1 Chitty's Pl. 205,) that such counts might be joined, and insisted that though such counts might be joined in actions *by* administrators, they could not be joined in actions *against* them. He cited 1 H. Black. 102; 2 Bos. & Pul. 424; 4 T. R. 347; 8 Johns. R. 440: 12 id. 349; 7 Cowen, 58; 2 Saund. 117 e.



A. L. Jordan, for plaintiff, insisted that the last count either charged the defendant *de bonis intestatoris*, or it was bad, and a judgment could not be rendered on it; and in either case, the plaintiff was entitled to judgment. Under that count, the plaintiff would be entitled to show that the obligation existed in the life time, but that the indebtedness did not accrue until after the decease of the intestate; as where the plaintiff was the surety, and did not pay until after the death of the intestate. In such case, the accounting could be only with the administrator, and the judgment of course would be *de bonis intestatoris*. There is nothing in the count which shews that the accounting was of and concerning monies for which the defendant would be personally liable, and the court will not presume the fact.

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v.  
Reynolds.

*By the Court*, SAVAGE, Ch. J. The declaration contains seven counts, all of which are admitted to be good, and to charge the defendant in his representative character, except the last, which, it is alleged, charges him in his individual capacity; and it is urged that, as the counts require different judgments, they cannot be joined in the same declaration.

It is well settled that if the counts be such as require different judgments, they cannot be joined: a judgment upon counts charging the defendant as administrator must be *de bonis intestatoris*; whereas upon a count charging the defendant individually, in his own right, the judgment is *de bonis propriis*.

The only question, therefore, is, whether the last count charges a personal liability; and whether a recovery upon it requires a judgment against the defendant in his representative or individual capacity. The count appears to be taken from 2 Chitty's Pl. 61, 2, and states that the defendant, as administrator as aforesaid, accounted with the plaintiff concerning divers sums of money due and owing from the defendant, as administrator as aforesaid; that upon such accounting, the defendant, as administrator as aforesaid, was found in arrear, and as administrator as aforesaid promised to pay, &c. Had the count stated the accounting to be *of and concerning divers*

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*sums of money due and owing from the intestate, in his life time to the plaintiff*, it would have fallen precisely within the case of *Secar v. Atkinson*, (1 H. Black. 102,) in which such a count was held to be properly joined with other counts stating promises by the intestate. The distinction is between causes of action existing in the life time, and those arising after the death of the testator or intestate. In the former cases, the judgment should be against the goods of the deceased; in the latter, against the goods of the representative. This distinction is taken in several cases in this court. (8 Johns. R. 440. 12 id. 349. 7 Cowen, 58.) The same distinction exists in the English courts, and is clearly stated in 2 Saund. 117, d. e., and that a count for money had and received by the defendant, as executor, for the plaintiff's use, or for money lent him, *as such*, or on an insimul computasset of money due from him, *as such*, cannot be joined to a count on a promise made to the testator; and such misjoinder of action, either by or against an executor, is a defect in substance, and therefore bad on general demurrer. (4 T. R. 347. 1 H. Black. 108. 2 Bos. & Pul. 424.) But a count on an account stated with an executor, *for money due from the testator*, may be joined to a count on a promise by the testator, this being the common mode of declaring against executors, to save the statute of limitations. (1 H. Black. 102.) Mr. Chitty, (1 Ch. Pl. 205, 6,) lays down the same rule, but supposes that since the case of *Cowell and wife, adm'rs, &c. v. Watts*, (6 East, 406,) the decision would be different in regard to an insimul computasset by an executor defendant. In that case, it was decided that a count for goods sold by the plaintiff, as administratrix, might be joined with a count upon an account stated with her, as administratrix, because the damages recovered would be assets. But I apprehend that does not do away the reason why such counts as are here joined may not be joined, because they require different judgments, and there would be an incongruity in the record. It seems, therefore, that an accounting with the plaintiff by the defendant, as administrator, without saying *for the indebtedness of the intestate*, creates a cause of action against the administrator personally; but if the accounting be *of and*

concerning money due and owing to the plaintiff by the intestate in his life time, such accounting creates no personal responsibility in the administrator; it raises no new duty on his part, and a promise by him upon such accounting may be joined in the same declaration containing promises by the intestate.

According to this rule, the last count in this declaration cannot be joined with the other counts. The demurrer is well taken, and the defendant is entitled to judgment, with leave to the plaintiff to amend, on payment of costs.

UTICA,  
August, 1829.  
Wheeler  
v.  
Townsend.

### WHEELER vs. TOWNSEND.

DEMURRER to plea. To a declaration of debt on judgment, the defendant pleaded that on the 30th May, 1818, he the defendant, having been actually imprisoned in the debtor's jail in New-York for sixty days then last past and upwards, upon execution in a civil action, within the true intent and meaning of the act for giving relief in cases of insolvency, and the acts amending the same, application was made to the recorder of New-York by one Samuel Townsend, a creditor of the defendant, for relief, pursuant to the said acts, (the said creditor being apprehensive that the estate or effects of the defendant would be wasted or embezzled;) and such proceedings were thereupon had that afterwards, on the 8th January, 1819, the recorder granted a discharge to the defendant from all debts, &c., and if in prison, from imprisonment, setting forth the discharge *in hæc verba*. The discharge recited that the creditor made affidavit that the insolvent was indebted to him in a sum of money not less than \$25, but there was no *averment* to that effect in the plea. For this cause the plaintiff demurred to the plea, and the defendant joined.

In a plea of a discharge of an insolvent debt, or under the ninth section of the act for giving relief in cases of insolvency, the fact that the insolvent was indebted to the creditor on whose application the proceedings were had in a sum not less than \$25, must be expressly averred, or the plea is bad on general demurrer. The recital of the fact in the discharge set forth in the plea will not supply the defect in the averments giving jurisdiction to the officer.

J. R. Van Duzer, for plaintiff.

D. H. Tuthill, for defendant.

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Wheeler

v.

Townsend.

*By the Court, SUTHERLAND, J.* The demurrer is well taken. In order to give the officer jurisdiction, to whom application is made for a discharge, under the ninth section of the act for giving relief in cases of insolvency, and the acts amending the same, (1 R. L. 464 ; Statutes, vol. 4, p. 41, b. and p. 23, c.) it is necessary not only that the debtor should have been *actually imprisoned for sixty days or upwards, upon execution in a civil action*, but it must also appear that *he is indebted to the creditor who makes the application, in a sum not less than \$25*. The proceedings under the ninth section are to be instituted by a creditor or creditors of the insolvent, and it is a particular description of creditors only who are authorized to make the application; *those whose respective debts are not less than \$25*. It is upon the application of such a creditor only that the officer acquires jurisdiction of the subject; the fact therefore should have been expressly averred in the plea. (1 Johns. R. 91. 7 id. 75. 11 id. 175. 19 id. 39. 20 id. 208. 3 Cowen, 206. 1 id. 316.) The case of *Wyman v. Mitchell*, (1 Cowen, 316,) shews that the want of this averment cannot be supplied by the discharge itself. Jurisdiction must first be given to the officer, before any presumption in favor of his acts can arise, and a recital in the discharge itself cannot confer or afford any evidence of jurisdiction.

Judgment for plaintiff on demurrer, with leave to defendant to amend, on payment of costs.

UTICA,  
August, 1829.

Hackett  
v.  
Huson.

HACKETT vs. HUSON and YOUNGS.

THIS was an action of covenant, tried at the Yates circuit in February, 1828, before the Hon. ENOS T. THROOP, then one of the circuit judges.

The declaration was on a covenant entered into by the defendants, bearing date the 26th February, 1822, whereby the defendants, "for a valuable consideration," bound themselves to execute and deliver to the plaintiff, on or before the expiration of four years from the day of the date of the instrument, a good and sufficient warrantee deed of a lot of land in Wayne county, excepting thereout certain portions. The breach assigned was the non-delivery of the deed. On the trial of the cause, the plaintiff proved the covenant, the quantity and value of the land to be conveyed, and rested. The defendants applied for a nonsuit, for that the plaintiff had not shewn that he had prepared and demanded a deed to be executed by the defendants. The presiding judge ruled that the plaintiff for that cause must be nonsuited, unless he could shew a waiver by the defendants of such offer and demand.

Further testimony was then given, from which it appeared that in the summer of 1826 the defendants had not obtained title so as to enable them to convey; that subsequently Huson obtained title by a deed from Connecticut, and on the 19th August, 1826, tendered to the plaintiff a deed of the land, executed by himself and wife, and by Youngs the other defendant, but not by the wife of Youngs, the consideration expressed in which was \$25, which it was admitted by the case was nothing like the value of the land. The plaintiff refused to receive the deed unless the value of the land was inserted as the consideration of the conveyance, which Huson refused to do. It further appeared, that about the 20th February, 1826, Huson then not having obtained his title, the plaintiff agreed that he would take no advantage of his inability to convey, if he gave him a deed when he pro-

Where a vendor of real estate, who was under a contract to execute and deliver a deed by a day certain, executed and tendered a deed which the vendee refused to accept, on the allegation that the true consideration of the conveyance was not expressed in it; and where, from the evidence produced on the trial, the true sum which ought to have been inserted as the consideration did not appear, the court refused to set aside a nonsuit which had been ordered, and intimated their opinion that to put the vendor in default, the vendee should have prepared a deed conformable to the agreement, and presented it to the vendor for execution, who, on refusal, would have been liable to an action

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cured his title. After hearing this evidence, the judge directed the plaintiff to be nonsuited.

A motion was then made to set aside the nonsuit.

*W. Woods*, for plaintiff.

*I. Taylor*, for defendant.

*By the Court*, MARCY, J. This is an action on a covenant to convey a certain piece of land situated in Wayne county. It is quite uncertain, from the case, what was the decision of the judge at the circuit. It is probably stated to be the reverse of what it really was. Take the whole case together, it would seem that the judge ruled that where a plaintiff has a covenant from the defendant to convey, he must prepare and tender a deed for the defendant to execute. This is the English rule, but it has not yet been adopted in this state. To put the vendor of real estate in default, it is necessary that the vendee should demand a deed, wait a reasonable time for the defendant to get it drawn, and then again present himself to receive it. (*Fuller v. Hubbard*, 6 Cowen, 1.) This was not done by the plaintiff in this case, nor did any thing take place between the parties to render the rule inapplicable, or to dispense with its observance. There was a deed tendered by the defendants, but it is said that it was not such a deed as the agreement contemplated. The case states that copies of the deeds were to be annexed to it. That has not been done, and of course we cannot say whether the deed was or was not sufficient. The only objection made to it was, that a sufficient consideration was not expressed in it. By the agreement, the defendants *for a valuable consideration*, (without specifying it,) became bound *to execute and deliver a good and sufficient warrantee deed* of certain premises. The consideration expressed in the deed tendered by the defendants was \$25; and the plaintiff refused it because it was not for the full value of the land. This was the only objection made to it when it was tendered. On the trial it was shewn that the defendant Youngs had a wife, and she was not a party to the deed; but no objection was made to it on that account. It appeared that the

title to the premises came from Connecticut to Huson; and though Youngs joined in the deed, he had no title to the land. His wife could not therefore have a claim for dower. There is some doubt whether the objection to the deed made by the plaintiff was well founded. The agreement does not disclose any thing by which we can infer that the consideration for the deed was more than the sum expressed in it, or that the defendants were bound to put in it the full value of the land as the consideration. At all events, if the plaintiff did not consider that the defendants tendered a deed pursuant to the agreement, he should have prepared one that did conform to it, and presented it to them to be executed; and if they had refused to do it, they would then have been in default.

UTICA,  
August 1829.

Jackson  
v.  
Crissey.

Motion to set aside nonsuit denied.

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JACKSON, ex. dem. BARTON, vs. CRISSEY.

THIS was an action of ejectment, tried at the Orange circuit before the Hon. JAMES EMOTT, one of the circuit judges.

The action was brought for the recovery of an undivided eighth part of certain premises in possession of the defendant, parcel of a farm whereof Amos Miles, the ancestor of the lessor of the plaintiff, died seised and possessed, and of whom she was one of eight heirs at law. To resist the recovery, the defendant relied on a quit-claim deed, alleged to have been executed by the lessor of the plaintiff, as long since as 1791, to her brother, Zachariah Miles, whereby she conveyed to him all her interest in the farm; which deed was alleged to be lost or destroyed. Zachariah Miles had previously obtained a conveyance of the farm from all his brothers and sisters, except the lessor of the plaintiff, and subsequently conveyed the same to one Zeno Carpenter, under title derived from whom, the defendant held. After giving proof of an unsuccessful search for the deed among the papers of the releasee, the defendant proved the testimony given by a wit-

The bare fact of two persons holding different parcels of what was once an undivided tract of land, deriving title from the same source, constitutes no *privity of estate*, so that the testimony of a deceased witness on the trial of an action of ejectment against one, for the premises in his possession, can be given in evidence in an action of ejectment against the other for the same claimant.

the premises possessed by him, although both actions be by the

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ness now dead, on the trial of an action of ejectment, brought by the present lessor of the plaintiff against one Lewis Barrett, for the recovery of another portion of the *same farm* whercof her father died seised. This testimony fully established the existence of such deed. The evidence of the testimony of the deceased witness was admitted by the judge, although objected to by the plaintiff. Other evidence of the existence of the deed was given, which was held sufficient by the court, independent of the proof of the testimony of the deceased witness, to sustain the verdict which was found for the defendant. The case is reported only in reference to the question of the admissibility of the evidence respecting the testimony of the deceased witness. A motion was made to set aside the verdict by

*J. R. Van Duzer*, for the plaintiff; which was opposed by

*C. H. Ruggles*, for the defendant.

The opinion of the court on this question as to the admissibility of this evidence was as follows:

*By the Court*, SAVAGE, Ch. J. What a deceased witness has sworn at a former trial between the same parties, in relation to the same issue, is proper evidence. Under the term *parties*, are comprehended all persons standing in relation of privies in blood, privies in estate or privies in law; (15 Johns. R. 544; but Barrett, in the suit against whom the testimony was given, was neither. He held indeed under the same title, that is, he derived title from Amos Miles though the deeds from his heirs to Zachariah Miles, and the conveyance from the latter to Zeno Carpenter, but his lot and the premises of the defendant are separate parcels of what was once the same farm. Barrett and the defendant do not hold different estates in the same premises: neither holds as remainder-man or reversioner to the other. There is, therefore, no privity of estate between them, and there is nothing in the case to shew either privity in blood or privity in law. In my opinion, therefore, the evidence of the testimony of the deceased witness, in the cause against Barrett, was not admissible, and ought not to have been received.



UTICA,  
August, 1829.

Farrell  
v.  
Warren.

FARRELL vs. WARREN.

THIS was an action for false imprisonment, tried at the Onondaga circuit, before the Hon. ENOS T. THROOP, then one of the circuit judges.

The plaintiff was ordered into the custody of a constable by the direction of the defendant, a justice of the peace, for keeping a *huckster* shop within three quarters of a mile of the *camp* ground, where a *methodist religious society* were assembled for public worship. (a) He was conducted to the

A justice of the peace, &c. under the act of 1824, in amendment of the "act for suppressing immorality," has a right, upon his own personal view of offences committed against that act, to order an offender into the custody of a constable for safe keeping, (without issuing a warrant) until the offender can be tried.

(a) By the fourth section of the *act for suppressing immorality*, (2 R. L. 194, passed March 5, 1813,) it is enacted "that if any person or persons whatsoever, either on the first day of the week called Sunday, or on any other day or time, shall wilfully and of purpose disquiet, interrupt or disturb any assembly of people met for religious worship, by making a noise, or by rude and indecent behaviour, or profane discourse, either within their place of worship or out of it, so near as to disturb the order and solemnity of the meeting, or exhibit any shows or plays, or promote or aid any horse-racing or gaming of any description, or expose to sale any ardent or distilled liquors whatever, or keep or open any huckster shop upon any part of any highway within the distance of one mile from the place where any such religious society shall be actually assembled for public worship, or shall, &c." and be thereof legally convicted, he or they shall for every offence, forfeit for the use of the poor \$25; and if the fine is not immediately paid, or security given for the payment thereof within 20 days, the person convicted may be committed to the common jail for a term not exceeding 30 days. The statute then proceeds as follows: "And that all judges, mayors, recorders, aldermen and justices of the peace, upon the view of any person or persons offending as aforesaid, are hereby authorized to order the said offender or offenders into the custody of any officer herein after named, or any official member of the church or society so as aforesaid assembled, for safe keeping, until he shall be let to bail, or a trial for such offence can be had according to law." By the next clause it is made the duty of all sheriffs, constables, &c. who shall or may be present at the public worship of any religious society interrupted or disturbed in manner aforesaid, to apprehend any and every such persons, &c.

In 1824, (Statutes, vol. 6, 374, c.) an act to amend the act for suppressing immorality was passed, which, after enumerating the same offences specified in the original act proceeds as follows: "or keep or open any huckster shop upon any part of any highway, or upon any lands, waters or streams within the distance of two miles from the place where any such religious society shall be actually assembled for public worship, the person or persons so offending shall be subject to the same penalties, and to be sued for, recovered and ap-

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camp, and put under the preacher's stand, where he was kept guarded. After hearing testimony, the justice imposed a fine upon him of \$20; he gave bail for the payment of it, and was discharged. He was arrested at nine in the evening, and discharged about half an hour before midnight.

It appeared that the plaintiff kept a huckster's shop in a wood house, where he sold herring, crackers, (*Anglice*, hard biscuits,) beer and cider. A witness testified that he was at the minister's stand when it was said, "go down to the road and see what is going on;" whereupon the witness, who acted as public prosecutor, the defendant, who was a justice of the peace, a constable, and another person, proceeded to the plaintiff's shop, and remained there ten or fifteen minutes, during which time the plaintiff sold cakes, beer and cider to a number of persons. The defendant then addressed the plaintiff, "I am sorry, Mr. Warren, to be under the necessity of apprehending you for a breach of the law," and ordered him into the custody of the constable, without issuing any warrant. They then proceeded together to the camp ground, where the defendant reported, "that they had brought in a huckster, and the subsequent proceedings of imposing a fine, &c. were had. A record of conviction, drawn up by the defendant, was produced, setting forth that on the 1st September, 1827, the plaintiff was convicted before the defendant, (a justice of the peace of the county of Onondaga,) of having on that day kept or opened a huckster's shop on certain lands in the town of Pompey, in the said county, within the distance of two miles from a place where a religious society in the town aforesaid was actually assembled for public worship.

The presiding judge charged the jury, that *the act to suppress immorality* authorized the defendant to proceed to a summary conviction of the plaintiff, but that the offence whereof the plaintiff was convicted, was not embraced by *that*

plied in the same manner as is provided in the fourth section of the act entitled an act for suppressing immorality." A *proviso* is added excepting from the operation of the act, persons licensed before the appointment of such meeting to keep inns, stores and groceries, who sell ardent or distilled liquors at his or their house, store, or other building where they usually reside or carry on business.

statute, not being committed in a highway; that the amendment to the act embraced the case, but although it warranted a summary conviction, yet it did not in *express* terms give the power to a justice to arrest or commit an offender to a constable for trial on his view of the offence; that penal statutes are to be construed strictly, and that the liberty of a citizen is not to be taken away or restrained by implication; therefore whether the defendant made the arrest himself or ordered the plaintiff into the custody of the constable on his own view of the offence, without process, if the plaintiff was restrained in his liberty and conducted to the camp as a prisoner by the act or order of the defendant, it was an unjustifiable trespass, for which the plaintiff was entitled to recover. He thereupon left the question of fact to the jury, whether the plaintiff was so restrained of his liberty, and if they found that he was so restrained, charged them to find for the plaintiff. The defendant excepted to the charge, and the jury found for the plaintiff with \$140 damages. A motion was now made to set aside the verdict.

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*F. G. Jewett*, for defendant. The defendant being a justice of the peace, *on view* of the violation of the provisions of the act of 1824, had the same authority to order the plaintiff into custody, that he would have had under the act of 1813. The question of fact which the judge submitted to the jury was not disputed by the defendant. The defendant relied upon the law for his justification, and the question which should have been submitted to the jury, was whether the defendant, *on view*, ordered the plaintiff into custody.

The justice (the defendant in this cause) proceeded under the fourth section of the act of 1813. *On view* of a violation of the act, he *ordered* the plaintiff into custody, and being brought before him, he obtained jurisdiction of his person and the record of conviction is a complete protection. The act of 1824, by declaring that offenders "shall be subject to the same penalties, to be sued for, recovered and applied in the same manner as is provided in the fourth section of the act" of 1813, conferred the same powers and authorized the same mode of proceeding designated by the latter act.

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*N. P. Randall*, for plaintiff. The naked fact of keeping a huckster's shop within the distance of two miles from the place of a religious meeting, without intending or creating any disturbance, is not within the evil intended to be remedied, nor within the meaning of the act. The latter clause of the fourth section of the act of 1813, shews the intention of the legislature, which was to punish licentious and disorderly persons who *interrupted or disturbed* the public worship of any religious society. Unless the act complained of is done with the intention to interrupt or disturb, or necessarily must have that effect, there is no offence. There was no noise or disturbance; there was no complaint made to the justice, but he left the place of worship to seek an opportunity to exercise his authority.

The act being highly penal, must be strictly construed. The shop was not in a *highway*, and therefore not within the provisions of the act of 1813. The act of 1824 prohibits such shop to be kept "upon any part of any highway, or upon any *lands*, waters or streams." The word *lands* must be understood here in its common or vulgar acceptation, viz. open fields, or woods, or why this particular enumeration. If used in its legal acceptation, there was no necessity for particularizing highways, waters, and streams, as the latter would be included in the former. A statute must be so construed as that no clause, sentence or word shall be superfluous, void, or insignificant. (1 Show. 108.) The intention of the legislature is to be sought after. (1 Black. Com. 59, 80.) A thing *within the letter* is not within the statute, unless it be *within the intention* of the maker. (Bacon's Abr. tit. Construction of Statute, 1, 5.) A statute should be so construed, that no man who is innocent be punished or damnified. (1 Inst. 360.) Allowing the act complained of to be *within the letter*, it is not within *the intent* of the legislature.

The act of 1824, gives no authority to the magistrate to order an offender into custody; it directs the penalties to be sued for, recovered and applied, in the same manner as is directed by the act of 1813. The right to commit *upon view* is not given in terms, nor necessarily implied. Where a statute of this kind admits of two constructions, that should be

given to it, which is consonant to the ordinary modes of proceeding and which secures the trial by jury. (3 Caines, 259.)

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*By the Court, SUTHERLAND, J.* The only question arising upon the decision of the judge before whom this cause was tried, and upon his charge to the jury, is, whether the defendant, who is admitted to have been a justice of the peace, had a right, upon his own personal view of the offence committed by the plaintiff, to order him into the custody of a constable for safe keeping, (without issuing a warrant,) until he could be tried. I am clearly of opinion that he had such authority.

It is conceded that the fourth section of the *act for suppressing immorality*, (2 R. L. 193,) authorizes an arrest in that manner. The terms are express: "That all judges, justices of the peace, &c. upon the view of any person or persons offending as aforesaid, are hereby authorized to order such offender or offenders into the custody of any officer, &c. for safe keeping, until he shall be let to bail, or a trial for such offence can be had according to law." The offence for which the plaintiff was arrested, and of which he was convicted, was created by the act of November 25, 1824, (Statutes, vol. 6, 374 c.) which was merely amendatory of the original act of 1813. The act of 1813 made it an offence to keep a huckster's shop, &c. upon any part of *any highway* within *one mile* from the place where any religious society might be assembled for public worship. The act of 1824 enacts, "That if any person or persons, &c. shall keep or open any huckster's shop, &c. upon any part of any highway, *or upon any lands, waters or streams* within the distance of *two miles* from the place where such religious society shall be actually assembled for public worship, the person or persons so offending shall be subject to the same penalties, and to be sued for, recovered and applied in the same manner as is provided in the fourth section of the act entitled an act for suppressing immorality." The legislature most clearly intended to authorize the same mode of proceeding *throughout* for the punishment of offenders against this act, as was authorized by the fourth section of the act of 1813. It purports

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to be an amendatory act merely ; it enlarges the circumference in which the keeping of huckster's shops is prohibited, and it is unreasonable to suppose that the legislature, at the same time that they extended the principles of the act of 1813, intended to restrict the means of punishment or conviction provided by that act. Nothing but the most explicit and unequivocal language would authorize such a conclusion. Persons offending against the act of 1824 shall be *subject to the same penalties, and to be sued for, recovered and applied in the same manner* as is provided in the fourth section of the act of 1813. One means of recovering the penalties authorized by the 4th section of the act of 1813, is for the justice of the peace, upon the view of any person offending, &c. to order him into the custody of an officer for safe keeping, until he shall be let to bail, or a trial for such offence shall be had according to law. That was the course pursued in this case, and I think it was fully authorized by the act.

This being the only point presented by the charge of the judge, to which the defendant excepted, it is unnecessary to express any opinion upon the merits of the case.

New trial granted.

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B. and H. E. HAIGHT vs. HOLLEY.

Whatever is necessarily understood, intended and implied in a plea is traversable, as much as if it were expressly

alleged. Thus, where to a plea of two suits pending for the same cause of action, the plaintiff replied that at the time of commencement of the suit in which the plea was interposed there was not another suit pending for the same cause of action, the replication was held to be good.

Where an issue of fact on a plea in abatement is found against the defendant, the judgment is final, and not a *respondeas ouster*.

The pendency of two suits, for the same cause of action, cannot be pleaded in abatement of each other, unless commenced at the same time.

In an action of debt against a sheriff for an escape, in which an issue of fact is joined on a plea in abatement, a *tam quam* clause is not necessary to authorize the assessment of damages.

Under our present mode of drawing and summoning juries, no defects in the *venire*, or irregularity in the issuing or return of it, will affect the judgment of the proceedings at the trial.

The declaration set forth a judgment in favor of the plaintiffs against William Badgley for \$1184,40, the issuing of a *ca. sa.*, the arrest of the defendant in the execution, and his escape on the 7th September, 1827. The defendant *pleaded in abatement* that on the *seventh* day of September, 1827, the plaintiffs sued out a *capias* against the defendant, tested 18th August, 1827, returnable on the third Monday of October then next, the *ac etiam* in which was to answer the plaintiffs in debt for the escape of William Badgley; and that on the *tenth* day of September, they sued out another *capias* precisely like the first; that the causes of action mentioned in the first and second writs are the same as those declared on; and that both suits are now pending, wherefore he prayed judgment of the declaration, &c. The plaintiffs replied, that at the time of the commencement of this suit, there was not another suit pending in favor of the plaintiffs against the defendant for the cause of action set forth in the declaration, concluding to the country, and praying judgment.

On the trial the defendant produced certified copies of the two writs of *capias* set forth in his plea; one of which had an endorsement on it purporting that the defendant was arrested on the *seventh* day of September, 1827; the other had an endorsement on it that it was received by the coroner on the *tenth* day of the same month; and both appeared to have been filed in the clerk's office on the eighteenth day of October, 1827. On this evidence the defendant rested.

On the part of the plaintiffs, it was proved that two writs were issued; one on the *sixth*, and the other on the *tenth* day of September, 1827, for two several escapes from imprisonment on the same execution, and that the declaration in this cause was for the escape for which the first writ was issued. That after the declaration was served, the plaintiffs' attorneys, at the request of the defendant's attorney, informed him in writing that they had declared in the first suit for the first escape. This evidence was received by the judge, although objected to by the defendant's counsel. The jury, under the direction of the judge, found a verdict for the plaintiffs.

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The plaintiffs' counsel then prayed that the damages might be assessed by the jury, to which the counsel for the defendant objected, because a *venire* had not been issued for the assessment of damages, and because that which had been issued had not been delivered to the coroner until the first day of the circuit. The *venire* was a common *venire facias* without a *tam quam* clause. The judge overruled the objection. The defendant then offered to prove that the escape of Badgley was by the procurement of the plaintiffs. This evidence the judge refused to receive; whereupon the plaintiffs produced the record of judgment in the original cause, and proved the payment to the defendant of \$19, 69, his fees on the *ca. sa.* The jury found for the plaintiffs for \$1184,40 debt, and assessed the damages at \$19,69, subject to the opinion of this court.

*Morris*, for plaintiffs. The *parol* evidence given by the plaintiffs and received by the judge was in support of the replication, and therefore proper. A *tam quam* clause was unnecessary in a case like this. (6 Cowen, 48.) Since the change in the mode of designating and summoning petit jurors, there is no longer a necessity for the *venire* being delivered a certain number of days previous to the circuit. Had it been in fact delivered to the coroner in this case, he had not the power to summon or return a jury different from that drawn for the circuit. If defective, it may be amended after verdict. (4 Cowen, 550.) In 7 Cowen, 509, the court say, that under the change effected relative to the summoning of jurors, a *venire* appears to be useless; and in 1 Wendell, 115, it is said to be a mere form, and that the omission to issue it is cured by the statute of *jeofails*. A writ of inquiry was not necessary, nor is the defendant entitled to judgment of *respondeas ouster*. (6 Cowen, 48. 1 East, 544. 2 Wils. 367. Bacon's Abr. tit. Abatement, O. P.)

*D. B. Tallmadge*, for defendant. The plea is good. (Bacon's Abr. tit. Abatement, m. 24, l. 14, b.) The replication is bad; it does not traverse a single fact alleged in the plea. The plea is proved, and the replication is proved, and the consequence is, that there has been a mis-trial. The plain-



tiff could not enlarge the subject of pleading. (Stephen on Pleading, 259, 279.)

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The plaintiffs were not at liberty to shew that there were two escapes; but having established the fact, they shewed that this suit could not be maintained, allowing it to have been brought for the first escape. The second suit for an escape from imprisonment on the same execution was an election to consider the defendant in execution in custody, and a wavier of the first escape.

If the plaintiffs are entitled to judgment, all they can ask is a *respondeas ouster*. Had the plaintiffs demurred, and had the demurrer been decided for them, such would have been the judgment. The plaintiffs going to trial on a question of fact confers no rights upon them, nor deprives the defendant of any he possessed. A party cannot, by his course of pleading, deprive his adversary of his legal rights. The only replication which could properly be interposed was that of *nul tiel record*. Having chosen, instead of demurring to plead over, the plaintiffs were in fault, and therefore there should be judgment of *respondeas ouster*. Even after plea *puis darrein*, such judgment may be rendered. (11 Mass. R. 124. 18 Johns, R. 137.) A plea in abatement does not confess the facts like a plea in bar, which confesses and avoids. (Stephen, 71.) The defendant hopes for judgment in his favor, at all events for judgment of *respondeas ouster*.

C. Bushnell, in reply. The information given in writing as to the cause of action declared on, was equivalent to a bill of particulars. The plaintiffs would have been held to it on the trial. The evidence in relation to it was therefore admissible.

It has been held that the commencement of a suit is a wavier of the right to elect to consider a party in custody; but it has never been decided that the commencement of a subsequent suit is a wavier of a former suit. A subsequent suit does not abate a former suit. (1 Wheaton, 217. 1 Chitty, 443. 2 id. 467.)

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The plaintiffs had a right to consider the defendant's plea as a plea of a prior suit pending, to take issue upon its substance, and give legal effect to it; for it is a rule of pleading, that whatever is necessarily understood, intended and implied, is traversable as much as if it were expressly alleged. (1 Chitty, 586. 2 Saund. 10, n. 14. 11 East, 406. 1 Ld. Raym. 39.) If the defendant did not approve of this course, he might have demurred. According to this construction of the plea, had the issue been found for the defendant, the plaintiffs would have been entitled to judgment *non obstante veredicto*.

*By the Court*, MARCY, J. The statute regulating the drawing and summoning juries, has made the jury process almost a matter of mere form; and in civil cases no defects in the *venire*, or irregularity in the issuing or return of it, will be now permitted to affect a judgment, or the proceedings at the trial. Even if the ancient strictness were adhered to, I do not consider the objection that the *venire* did not contain a *tam quam* cause, well founded. The case did not require such *venire*. (6 Cowen, 48. 1 Wendell, 115.) The plea was defective, and, strictly construed, did not interpose any matter of defence. The pendency of two suits for the same cause of action, cannot be pleaded in abatement of each other, unless they were commenced at the same time. Where two suits are commenced for the same cause of action at different times, the pendency of the former may be pleaded in abatement of the latter. The plaintiffs chose to consider the plea as tendering an issue of a former suit pending, and the replication puts that fact in issue.

The defendant contends that judgment cannot be rightfully entered against him, because he sustained at the trial the truth of his plea. He proved that two suits were pending against him by the plaintiffs for the escape of Badgely, but he did not shew that they were for the same escape; and the plaintiffs shewed that the second suit was commenced after the escape for which the first was brought. It is not strictly true, therefore, that the defendant fully established every allegation and fact stated in his plea. The plaintiffs insist that

they had a right to consider the plea good, and to imply and traverse what would make it so, to wit, the pendency of a former suit. The cases in 11 East, 406, and 1 Ld. Raym. 39, seem to warrant this position. In the case reported by Lord Raymond, the action was for the escape of a prisoner, and the plea was a *recaption*, which was undoubtedly bad without alleging a *detention*. The plaintiff put in issue the recaption and detention. The defendant demurred to the replication, because the plaintiff had included in his traverse matter not alleged in the plea. The plaintiff had judgment upon this demurrer. This decision, as Lord Ellenborough says, in remarking on that case, "must have proceeded upon the ground that the detention of the prisoner was virtually implied in the plea, and the plaintiff might therefore include it in his traverse."

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It was urged, on the argument, that if there was a judgment against the defendant, it should be a *respondeas ouster*. The rule is, when the judgment is on demurrer, it is a *respondeas ouster*, but where the issue of fact on a plea in abatement is found against the defendant, the judgment is final. The issue here having been found for the plaintiffs, judgment must be final.

Judgment final for plaintiffs.

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#### BLEECKER vs. BALLOU.

**DEMURRER** to declaration. The plaintiff declared in *covenant*, for that he, together with several other persons, on the 10th November, 1806, executed an indenture of lease to the defendant of a lot in the village of Utica, for a term commencing in July, 1808, and ending in January, 1829, reserving an annual rent; that by the indenture of lease, the defendant covenanted, at his own proper costs and charges, *to bear, pay and discharge all taxes, charges and impositions*, which

Where a tenant took a lease of a village lot for 21 years, and covenanted to pay all taxes, charges and impositions which should be imposed upon the demised premises; and during the term,

the premises were subjected to an assessment for pitching and paving a street, under an act incorporating the village and authorizing such assessment, passed subsequent to the date of the demise; it was held, that by the terms of the covenant, the tenant was liable to pay the assessment, although the expenditure was for a permanent benefit, extending beyond the term.

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should be taxed, charged, imposed or assessed upon the demised premises, or any part thereof; that in 1809, the interest of his co-lessors vested in the plaintiff; that on the 1st July, 1825, the board of trustees of the village of Utica, by virtue and in pursuance of the act of the legislature incorporating the village, passed April 7, 1817, ordered and directed a street in the village, on which the demised premises are situate, to be pitched and paved: that they caused an assessment of the expense to be made on the *owners, occupants* and others interested in all the houses and lots intended to be benefited by the improvement, in proportion to the advantages which each were deemed to acquire; and the sum of \$40,50 was assessed on the demised premises to the plaintiff, as the *owner* thereof, which remaining unpaid, the right and title of the plaintiff to the demised premises was sold on the 11th April, 1826, for the term of one year and nine months, being the lowest term of time offered at which the premises would be taken for paying the said assessment. The plaintiff averred notice to the defendant, a requirement to pay the assessment, and the defendant's refusal; and so he alleged the defendant had broken his covenant, &c. The defendant *demurred*, and the plaintiff joined.

*T. E. Clark*, for defendant. The covenant of the defendant does not embrace an assessment for *paving streets*. *Taxes* are burdens, charges or impositions for the benefit of the *public*. (81 Johns. R. 77.) Taxes charges and impositions mean the *land tax*, or taxes *ejusdem generis*. (3 T. R. 461.) A covenant to pay all taxes, duties, assessments and impositions does not embrace the repair of a *party-wall*. (8 T. R. 602. 3 id. 458. Woodfall, 258, 9.) Extraordinary repairs, which tend to the benefit of the inheritance, a lessor, reversioner or remainderman may be assessed to pay. (6 Com. Dig. tit. Sewers, E, 5.) Every person ought to be charged in proportion to his profit. (id.)

The law authorizing the assessment was not in force at the time the indenture was executed, nor until ten years afterwards; this assessment cannot, therefore, be presumed to have been in the contemplation of the parties, and for that reason cannot be considered as comprehended in the cove-

nant. (Salk. 198. Ld. Raym. 318, S. C. Carthew, 438. 12 Mod. 169, 70. 2 Lev. 68.) This case is distinguishable from 10 Johns. R. 96, and 11 id. 443. In those cases, the *tenants* were assessed; here, the assessment was imposed on the *landlord*, according to the advantage derived by him. In those cases, the law authorizing the assessment was in force at the execution of the leases, which circumstance is particularly alluded to by the court, as authorizing the presumption that the assessment must have been in the contemplation of the parties; here, the law under which the assessment was had did not exist until long after the demise, and the situation of the property in 1806 was such that it could not have entered into the contemplation of the parties that by possibility it could be subjected to charges of the nature which have produced this suit.

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*C. A. Mann*, for plaintiff. The demand in this case falls within the plain sense and terms of the covenant, and the defendant is therefore liable. In *Giles v. Hooper*, (Carthew, 135,) where the question arose on a lease for years, rendering rent, free and clear from all manner of taxes, charges and impositions whatever, (the very language of the covenant here,) it was ruled that there should be no deduction for a land tax imposed by statute subsequent to the lease, for the covenant extended to every old and *new charge whatsoever*. So, also, the rule is laid down in Woodfall, 254, and Bac. Abr. tit. Covenant, F. In cases similar in principle and circumstances to the one now under consideration, this court have held the tenant bound. (10 Johns. R. 96, and 11 id. 443.) It is impossible to draw a line of distinction as to what charges and impositions the tenant shall, and what he shall not be liable to pay. Having bound himself to pay *all* taxes, charges and impositions he cannot complain that he is required to fulfil his covenant. The court cannot look into equitable considerations. Was it allowable, it might be readily shewn that the enhanced value of the demised premises was more than an equivalent for the charges imposed, considering the lowness of the rent reserved.

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*By the Court, SAVAGE, C. J.* Had there been no decisions of courts upon similar covenants, I should think it clear that the parties intended precisely what the language of their contract imports; that the lessor ran the risk of *all* taxes, charges and impositions. These are not words without meaning; nor can I suppose that they were used as synonymous. They import that the landlord was to receive his rent, and during the term, was to be subject to no expense on account of the demised premises. Such is the language of this court in the case of *The Corporation of New-York v. Cushman*, (10 Johns. Rep. 97,) upon a similar covenant. By the terms of the covenant in that case, the tenant bound himself to pay "all such duties, taxes, assessments, impositions and payments, as shall during the term hereby demised be issued or grow due and payable out of and for the said demised premises." The action there was for an assessment on the lot for its benefit, by the extension of Chamber street; and the court said the demand falls within the plain sense and language of the covenant. They enter into an examination of some of the English cases, and shew upon the principles acted on in some of them, that the assessment was binding on the defendant.

There is no doubt that the assessment in question was not a *tax*, that being a sum imposed, as it is supposed, for some public object. (11 Johns. Rep. 77.) And as to such, it is said that a covenant like the one in question must be enforced without any deduction for a tax imposed by statute subsequent to the lease, (Carth. 135;) but in other cases it is said that a covenant to pay taxes extends only to taxes in use when the lease is executed. (2 Lev. 68.) In the case of *New-York v. Cushman*, the court say that the assessment was made by virtue of a law in force when the lease was made, which it was presumed was in the contemplation of the parties. But in *Brewster v. Ketchin*, Ld. Raym. 317, a covenant to pay a rent charge without deducting for any taxes, was held to extend to all taxes of a similar nature, and for like purposes with any before imposed though not then subsisting. If this principle be correct, then, charges and impositions may refer to such charges and impositions as are known to be made upon other property similarly situated.

The premises in question were leased as a village lot, and therefore the parties may have anticipated that within the term granted some improvements might become necessary and proper, which would require charges and impositions. If the covenant is to be confined to such charges as were imposed when the lease was executed, the tenant was not liable to pay the United States tax which was subsequently imposed; and for the same reason, he should not be required to pay any tax growing out of an expenditure under any laws of the village. Such a construction would not meet the views of the parties when they entered into the contract. At that time no doubt a rent was agreed on proportionate to the then value. If the property became enhanced in value, the defendant had the benefit of the increased value. And if the improvement of the property required some expenditure, there is no hardship in such expenditure being made by the tenant, who has reaped the advantage. It is true the *paving* is a permanent benefit to the property, and extends beyond the term; and although that may benefit the landlord, yet it cannot be said to injure the tenant. The terms of the contract seem to me to be clear and explicit, and upon them I place my opinion. The plaintiff is entitled to judgment on the demurrer.

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THOMAS vs. ROBINSON.

THIS was an action of *debt* tried at the Chenango circuit in July, 1827, before the Hon. SAMUEL NELSON, one of the circuit judges.

The declaration contained a count in debt on a judgment rendered by a justice of the peace of the county of Susquehannah, in the state of *Pensylvania*, on the 16th March, 1820, for the sum of \$70,09½, and also the common money counts. The defendant pleaded *nil debet*.

appears that the subject matter of the suit was within the jurisdiction of the court, and that the proceedings were had in conformity to the statute, the judgment will be entitled to full faith and credit.

A suit cannot be maintained here on a judgment obtained in a justice's court in a sister state, unless the statute organizing such court be shewn; if, on the statute being proved, it

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On the trial of the cause the plaintiff offered in evidence a transcript from the docket of the justice, authenticated by a certificate of the prothonotary of the court of common pleas of the county of Susquehannah, in the state of Pennsylvania, under the seal of the court, which being objected to by the defendant, was rejected by the judge. The justice before whom the judgment was rendered then testified that he was an acting justice of the peace at the time of the rendition of the judgment, and proved the rendering of the same, and that the judgment remained unsatisfied on his docket. The plaintiff then offered to prove by the justice that he had jurisdiction of the cause, under a statute law of the state of Pennsylvania; which evidence was objected to, but received, subject to the opinion of this court on a case agreed to be made. The defendant insisted that the proof was not sufficient to entitle the plaintiff to recover.

*Throop & Smith*, for plaintiff.

*Vander Lyn & Thorp*, for defendant.

*By the Court*, SUTHERLAND, J. This being an action of debt upon a justice's judgment rendered in the state of Pennsylvania, it was incumbent upon the plaintiff to shew that the magistrate had jurisdiction of the subject matter of the suit as well as of the person of the defendant. Courts of justices of the peace are not courts of record. They do not proceed according to the course of the common law. (1 Johns. Cas. 20. 3 Johns. R. 429.) They are confined strictly to the authority given them by statute, and can take nothing by implication, but must show their authority in every instance, and must comply with the forms prescribed by the statute creating them. (1 Johns. Cas. 228. 1 Caines' R. 191, 594, n. a. 3 Caines' R. 152.) A court of general jurisdiction is presumed to have acted in each particular case by competent authority, and its records are evidence not only of its acts but of its jurisdiction. (*Wheeler v. Raymond*, 8 Cowen, 311.) But the rule is different in relation to inferior courts; their jurisdiction must always be shewn. (*Mills v. Martin*, 19 Johns. R. 33, and cases there cited. *Borden v.*



*Fitch*, 15 id. 140. 19 id. 39. *Andrews v. Montgomery*, 19 id. 162.) It appeared affirmatively in this case that justices' courts in the state of Pennsylvania were created and organized by statute. The superior courts of that state would take judicial notice of the authority and jurisdiction conferred by statute upon these courts; but the courts of another state have no judicial knowledge of the statute law of Pennsylvania. It was essential therefore, in order to shew what faith and credit would be given to the judgment of these courts in Pennsylvania, to produce and prove the authority under which they were organized and proceeded; this could only be done by producing and proving the statute by which they were created. If that shewed that the subject matter of the suit was within the jurisdiction of a justice's court, and the proceedings appeared from the record to have been in conformity with the directions of the statute, then it would be entitled here to full faith and credit. (*Mills v. Duryce*, 7 Cranch, 481. *Andrews v. Montgomery*, 19 Johns. R. 162. *Shumway v. Stillman*, 4 Cowen, 292.) The plaintiff's evidence was therefore defective in this respect, and it is unnecessary to notice the other points in the case.

UTICA,  
August, 1829.

Peltier  
v.  
Sewall.

New trial granted.

#### PELTIER VS. SEWALL.

THIS was an action of *assumpsit*, tried at the New-York circuit in March, 1828, before the Hon. OGDEN EDWARDS, one of the circuit judges.

The plaintiff was the shipper of the principal part of a cargo embarked on board a ship at New-York for Havre, and

Where A. agreed to furnish a certain number of bales of cotton towards completing the cargo of a vessel bound to a

foreign port, principally freighted by B. on B. paying him the full price of the cotton; the shipment, however, to be made one half on account of A. and the remaining half on account of B. and on returns of sales coming to hand, A. to receive his share of the profits, or to pay his share of the loss, and the cotton was shipped by B. to his consignees abroad. *It was held*, that an action for money paid would not lie, A. being liable only in an action on the special agreement for a loss, if any sustained, in the sale of the cotton, and not for the total amount of the advance on his account.

Such agreement did not create a *partnership*, the parties were tenants in common in the article shipped.

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Peltier  
v.  
Sewall.

some additional freight being wanted to make out a full cargo, H. D. and E. B. Sewall, of whom the defendant is the survivor, were applied to by one Wood, the ship's husband, in May, 1825, to make a shipment by the vessel. The Messrs. Sewalls agreed to furnish sixteen bales of cotton, one half on their own account, provided Wood would procure an advance to them of  $\frac{3}{4}$  per pound on the cotton, that being its price. The plaintiff agreed to make the advance, and it was then agreed that the cotton should be shipped to Havre, one half on the account of the Messrs. Sewalls, one quarter on account of Wood as representing the owners of the vessel, and the remaining fourth on account of the plaintiff, consigned to Peltier and brothers there, who were the brothers and correspondents of the plaintiff, and when the returns were received from France, the Messrs. Sewalls should receive their share of the profits or pay their share of the loss. The plaintiff paid the Messrs. Sewalls \$1762,66, the price of the cotton, and it was laden on board the vessel. In the invoice it was stated that the cotton was shipped by the plaintiff for account and at the risk of the parties above named.

The plaintiff offered to prove an account of sales of the cotton received from the consignees, without offering to prove its verity; this was objected to, and the account was rejected. The plaintiff then said he would allow the defendant a credit on account of the sales, and would claim only a balance of \$369,75 with interest and rested. The defendant moved for a nonsuit, because the action, if any, should have been brought on the special agreement, and that the plaintiff could not recover on the account for money paid, (the declaration containing only the common money counts,) and because a partnership existing between the parties an action at law could not be sustained. The judge refused the motion, and being of opinion that sufficient evidence had been given to submit the cause to the jury, left the same to them, who found a verdict for the plaintiff for \$369,75. The defendant excepted to the decision of the judge. A motion was now made to set aside the verdict.

*R. Sedgwick*, for defendant.

*W. Slosson*, for plaintiff.

UTICA,  
August, 1829.

*Peltier*  
v.  
*Sewall*.

*By the Court*, MARCY, J. I am strongly inclined to think that the several persons concerned in this adventure, as respects each other at least, may be regarded as tenants in common, and the objection to sustaining the action arising from a supposed partnership is not well founded; but the first objection appears to me insurmountable. The agreement was special. The defendant was to furnish the cotton, and to be interested to the amount of one half, on condition that the plaintiff would advance the price for the whole, and when the returns of sales should be received from France, the defendant was to pay his share of the loss, in case there was a loss. The clear intent of the parties was, that the plaintiff was to receive for his advance on the cotton the avails of it in France, and the defendant was to be called upon to pay only in the event of a loss. This is evident from the fact that the consignees were the brothers and correspondents of the plaintiff, and the invoice stated the shipment to be made by the plaintiff on account and at the risk of the parties concerned in the adventure, and that he did actually receive the avails.

It will scarcely be pretended that the defendant could have been required, immediately after the advance was made, to pay the price of one half of the cotton; and if not then, when was he liable to pay? never in my judgment for the whole amount unless there had been a total loss of the property adventured. His contract was to pay only for the loss, and not for the total amount of the advance on his account. If there was a loss, the plaintiff should have declared for such loss, and to the extent of it he might have recovered.

New trial granted.

UTICA,  
August, 1829.

Bradly  
v.  
Field.

BRADLEY VS. FIELD.

Where the maker of a note against which the statute of limitations had run on its being presented to him for payment, said that the note had been paid in services performed for the payee; that the services were not done to apply on the note, but there was a running account between him and the payee, and he intended the amount should be set off against the note or against the payee, and agreed to produce his account, but at a subsequent day said it was burnt; it was held, that those declarations did not amount to an admission of a subsisting indebtedness, without which a promise could not be implied.

A discharge under the act abolishing imprisonment for debt in certain cases, may be given in evidence under a plea of the general issue; and a variance between the discharge pleaded and that produced on the trial will not prevent the party from offering the discharge in evidence.

ERROR from the Saratoga common pleas. Field sued Bradley before a justice of the peace, and declared on a promissory note given by the defendant to the plaintiff for the sum of \$14,26, dated May 8, 1816. The defendant pleaded the general issue, the statute of limitations, and a discharge under the act abolishing imprisonment for debt, granted in September, one thousand eight hundred and twenty one, by James McCrea, Esq. a judge, &c. The plaintiff replied a new promise within six years, denied the granting of the discharge, and alleged fraud in the obtaining of it. The cause was tried before the justice in September, 1827, who rendered judgment for the plaintiff. The defendant appealed.

On the trial of the cause in the common pleas, the plaintiff proved that in August, 1827, his agent presented the note in question for payment to Bradley, who said that it had been paid; the agent asked how he had paid it; he answered, in services done for Field. On being asked if the services were done to apply on the note, he answered no; there was a running account between him and Field, and he intended the amount should be set off against the note or against Field. The agent suggested to him the propriety of bringing his account to the justice's office, and have it applied on the note. The defendant agreed to do so. At a subsequent day, being asked whether he had brought down his account, he answered that it was burnt. On this evidence, the defendant moved for a nonsuit, which was denied. The defendant accepted.

The defendant then offered in evidence a discharge under the act abolishing imprisonment for debt in certain cases, granted to him by James McCrea, Esq. a judge of the Saratoga common pleas, bearing date in September, one thousand eight hundred and twenty; which was objected to on the ground of variance between the discharge pleaded, and that

produced on the trial will not prevent the party from offering the discharge in evidence.

offered to be given in evidence. The court refused to receive the discharge. The defendant also excepted to this decision. After some further proof being given, the jury found a verdict for the plaintiff for \$24,23, on which a judgment was entered, and to reverse which judgment a writ of error was sued out.

UTICA,  
August, 1829.

Bradley  
v.  
Field

*J. Ellsworth*, for plaintiff in error.

*W. L. F. Warren*, for defendant.

*By the Court*, SAVAGE, Ch. J. Two questions are presented by the bill of exceptions; 1. Whether enough was shewn to take the case out of the statute of limitations; 2. Whether the defendant's discharge should not have been received.

On the first point there are many contradictory decisions. I consider the law correctly stated by Spencer, justice, in *Sands v. Gelston*, (15 Johns. R. 520.) "If, at the time of the acknowledgment of the existence of the debt, such acknowledgment is qualified in a way to repel the presumption of a promise to pay, then it will not be evidence of a promise sufficient to revive the debt and take it out of the statute." And again, in conclusion, he says, "though the defendant admits the debt has never been paid, if he protests against his liability, it would be an outrage on common sense to infer a promise to pay in the face of his denial of his liability." The same doctrine is found in 11 Wheaton, 309, and 1 Peters, 362. In my opinion, therefore, the court erred in inferring a promise. When the defendant said he had paid the note by a running account for his labor, he clearly did not intend to admit a subsisting indebtedness, which is necessary to imply a promise.

On the other point I think the court were in error also. The defendant was entitled to give his discharge in evidence on the general issue. His mistake in describing it when it was superfluous to plead it, ought not to prejudice him. There was no more surprise on the plaintiff than if he had pleaded the general issue only. The judgment must be reversed, and a venire de novo awarded to Saratoga common pleas.

UTICA,  
August, 1829.

Shields  
v.  
Craney.

SHIELDS vs. CRANEY and HOIT.

A written memorandum made by a captain of a company of horse-artillery, of an application to him by a member of his company, to enrol his horse for service, is a sufficient enrolment under the militia law to exempt such horse from seizure on execution. It is not necessary an entry should be made on the roll of the company.

ERROR from the New-York common pleas. This was an action of *trover*, for a horse taken and sold under an execution on a judgment in favor of Craney against Shields, Hoit being the officer who made the sale. On the trial, the plaintiff claimed that the horse was exempt from seizure on execution he, the plaintiff being a member of a company of horse-artillery in the city of New-York, and the horse duly enrolled according to the directions of the militia law, (Statutes, vol. 6, 361, b. § 100,) which exempts from seizure by execution the "weapons, accoutrements and other equipments together with every horse actually enrolled for service and belonging to any member or members of said brigade." The plaintiff became a member of a company of horse-artillery in April, 1824. On the 10th of June, 1825, he made application to his captain to enrol his horse, the horse was not produced to the captain, but the captain took a description of him from the plaintiff, and made a memorandum of the application at the time, and a few days after gave the plaintiff a certificate that the horse was enrolled, but did not make an entry on the roll of the company until three or four days before the trial. A witness on the part of the defendants testified that he had been in the horse-artillery 18 years, that when a horse is enrolled he is presented to the enrolling officer, who examines him, notes his particular marks and designates those marks on the roll; in the regiment to which he belonged, a book is kept in which the enrolment is made.

The presiding judge charged the jury that the enrolment should have been by an actual entry on some roll or book kept for that purpose, where it could, on application, have been seen by a creditor who had a judgment against the owner of the horse; and that as such enrolment had not been made before the property was levied on, and in fact not until after the sale on the execution, the horse was not protected from seizure by the mere application for enrolment

or the intention on the part of the officer to make it ; and that the facts disclosed did not amount to an actual enrolment before the horse was taken in execution. The plaintiff excepted to the charge. The jury found for the defendants ; to reverse the judgment entered on which verdict, a writ of error was sued out.

UTICA,  
August, 1829.

Shields  
v.  
Craney.

*W. Mulock*, for plaintiff in error.

*R. Bogardus*, for defendant.

*By the Court, SUTHERLAND, J.* The only question in this case is whether the horse of the plaintiff had been *actually enrolled for service*, within the meaning of the 100th section of the militia act of 1823. I am inclined to think the construction given to the act by the court below was too rigid. The plaintiff had done every thing in his power to procure an enrolment of his horse. He made a formal application to the proper officer ; gave him a description of the animal ; and the officer made a *written memorandum* of the transaction, and gave the party a certificate that his horse was enrolled. The written memorandum may properly be considered an enrolment. So far as the object of the provision was to enable creditors to ascertain what property of their debtor is exempt from execution, it is not defeated by this construction. The roll of the company is not a public record to which parties can resort as matter of right, to obtain information ; application must be made to the officer, whose duty it is to make the enrolment ; and if he has in his possession any written memorandum which describes the horse, made at the time of the application to have him enrolled, I should be inclined to think the horse should be exempt from seizure by execution.

Judgment reversed.

UTICA,  
August, 1829.

Sewall  
v.  
Russell.

SEWALL and others vs. R. & J. RUSSELL.

Where information of the dishonor of a bill of exchange is sent to an agent who is not a party to the bill either actually, or nominally for the purpose of collection, with a request to give notice to the drawers, and he omits to give such notice until the next day after receiving such information, the drawers are discharged; being a mere agent, he should have given immediate notice.

THIS was an action of assumpsit, tried at the New-York circuit in April, 1827, before the Hon. WILLIAM A. DUER, one of the circuit judges.

On the 19th May, 1825, the defendants sold to the plaintiffs a bill of exchange for £1000, drawn by them upon Messrs. Wainright and Shiels of Liverpool, (England,) payable 60 days after sight. The bill was accepted on the 20th June, and protested for non-payment on the 22d August. Information of the failure of the acceptors arrived in New-York on the 27th September. The plaintiffs, (who reside in Boston,) on the 30th September wrote their agent, residing in New-York, where also the defendants reside, that they had received advise that the bill had not been paid, and would be returned from the bankers on the next day; that the original bill, with the protest, would no doubt be received in a few days, and desiring the agent to procure security. The letter was received by the agent on the 3d of October, and on the next day he gave notice to one of the defendants, (who were partners,) and demanded security. On the 4th of October the plaintiffs enclosed the bill and protest to their agent, who immediately, on receiving the same, shewed the protest to one of the defendants. The agent had purchased the bill for the plaintiffs. His name did not appear upon it, but the defendants knew that he acted in behalf of gentlemen in Boston. The mail leaves Boston every day for New-York at one o'clock P. M., and arrives early in the morning of the second day thereafter. The jury found a verdict for the defendants, which was now moved to be set aside.

*R. Sedgwick*, for plaintiffs.

*W. Slosson*, for defendants.



*By the Court*, SAVAGE, Ch. J. The only question is, whether the defendants had due notice of the dishonor of the bill. Where parties to a bill reside in different places, notice of the dishonor must be given by the next mail after information is received. This however means reasonable diligence; and the above rule is not literally applicable where there is not sufficient time between the arrival and departure of the mails to prepare the notice, consistent with necessary attention to other concerns; but no more than one day should intervene where there is a daily mail between the two places. (Chitty on Bills, 291, and cases cited. 5 Cowen, 303, and cases cited.) This rule is applicable to the parties here.

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Sewall  
v.  
Russell.

In the case last referred to, where the bill passed through two banks for the purpose of collection, and where there was a delay of one day at one of the banks, we held that the banks were, for the purpose of giving notice, to be considered *holders*, though they had no other interest but as agents for collection. In this case, the plaintiffs at Boston received information of the dishonor of the bill on the 30th September. It was their duty to have given notice by the mail which left Boston for New-York on the 1st of October. They did in fact send notice by that mail, which, if directed to the defendants, would have been sufficient; but it was addressed to their agent at New-York, and was received by him on the 3d October. Had he communicated the notice on the same day, the defendants would have had no ground of complaint. He did not do so on that day, but on the next day (the 4th of October) he gave notice. Had this agent been a party to the bill, or had he been so only nominally by having his name on the bill for the purpose of collection, he would have been justified in withholding the information one day, according to the authority first cited. But as he was the mere agent of the plaintiffs, he should have given immediate notice. This point has been so decided in *The United States v. Barker*, (12 Wheaton, 559, 60, 61,) in which case a notice, received by an agent on the morning of the 11th May, was given to the defendant on the 12th; the circuit court held that the agent was guilty of negligence, and the defendant, who was an endorser, was discharged. This de-

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Sharp  
v.  
Sharp.

cision was confirmed by the supreme court of the United States, and is in point. It is reasonable also that if a party chooses to give notice through an agent, he shall cause such notice to be given as early as the defendant would have received the same notice had it been sent by mail.

I am therefore of opinion that, according to the rules applicable in such cases, the notice to the defendants was given too late, and the motion for a new trial should be denied.

SHARP vs. SHARP and others, heirs at law of SHARP.

A replication to a plea of *riens per descent* in a *scire facias* against heirs, *quare executionem non*, that the heir had lands, &c. is good without particularizing the lands descended, &c.

DEMURRER to replication. *Scire facias quare executionem non* against heirs at law, on a judgment against the ancestor, to be levied of the lands and tenements whereof the ancestor died seised, and which descended to the heirs. The defendants pleaded *riens per descent*. The plaintiff replied that upon the death of the ancestor divers lands and tenements whereof he was seised in his life time, and at the time of his death, did descend to the defendants as such heirs at law, to wit, at the city of New-York, in the county of New-York, concluding to the country. The defendants demurred, specially assigning for cause the want of specification in the replication of the lands alleged to have descended. The plaintiff joined in demurrer.

D. B. Tallmadge, for defendants. In a proceeding against heirs by *scire facias* they may plead *riens per descent*. (Cormyn's Dig. Pleader 3, L. 5.) The statute, (1 R. L. 316,) allowing a *general* replication, that the heirs have land, &c. in any action brought against such heirs, contemplated a suit brought for the debt of the ancestor, not a *scire facias* on a judgment. To the plea put in, the plaintiff was bound to specify the lands which he alleged had descended, the same as a plaintiff must allege the particulars of his demand after a plea of *non damnificatus* to a bond of indemnity. (Stephen on Pleading, 362.) Unless he did so, heirs might be greatly prejudiced. The action is local, and the replication should

specify the lands, so that it may be seen that the venue is proper. (Comyn's Dig. pleader N. 4, 5. 9 Johns. R. 250.) The declaration is defective for the want of a venue.

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v.  
Sharp.

*G. Griffin*, for plaintiff. The statute allows a general replication in any action brought against the heir. *Scire facias* is an action; having all the characteristics of an action, and coming within the very words of the statute, the replication is good. But it is not necessary to rely upon the statute to support the replication; it is good at common law. Whenever the matter relied on in pleading is peculiarly within the knowledge of the adverse party, the party pleading is not bound to set it forth particularly, for should he err in the specification, the error would be fatal. A general replication is therefore allowed in such cases. There is a venue in the margin of the declaration, and that is enough.

*By the Court*, SUTHERLAND, J. The fourth section of the act for the relief of creditors against heirs and devisees, (1 R. L. 316, sec. 4.) provides that when any action shall be brought against any heir, such heir may plead *riens per descent* at the time of the commencement of such action, and the plaintiff may reply "that such heir had lands, tenements, or hereditaments from his or her ancestor before the commencement of such action." Although a proceeding by *scire facias* is technically a suit or action, I am inclined to think it is not such an action as was contemplated by the legislature in the section of the act above cited; for the act further directs that if the issue be found for the plaintiff the jury shall enquire of the value of the lands descended, &c. and judgment and execution shall be awarded accordingly. Upon *scire facias quare executionem non* there is no enquiry or assessment of the value of the lands, &c. But independently of the statute, the general replication is good at common law. The plaintiff is not bound to set forth particularly in his replication the lands descended, &c. because the fact must rest most especially in the knowledge of the defendant; the plaintiff cannot be supposed to have that precise knowledge on the subject which the defendant must have; he is not

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therefore obliged to attempt to specify. It is not analogous to the case of debt on bond of indemnity, where, to a plea of non damnificatus, the plaintiff in his replication must state the particular damage of which he complains; and he must state it upon the principle to which I have just adverted, because it is peculiarly within his knowledge.

The objection as to want of venue is unfounded in fact. There is a venue in the margin of the declaration, to which all the other pleadings are supposed to refer, and by which they will be aided. (1 Chitty, 279. 1 Dunlap, 247. 9 Johns. R. 81. 10 East, 365. 1 Taunt. 379.)

Judgment for plaintiff on demurrer, with leave to defendant to rejoin, on payment of costs.

DUNHAM vs. WYCKOFF.

A person having the property in goods and chattels, and having the right to reduce them to actual possession, may bring replevin against an officer who takes them by virtue of an execution out of the possession of the defendant in the execution.

DEMURRER to plea. The plaintiff declared in replevin for taking a quantity of household furniture, averring the same to be his goods and chattels. The defendant avowed the taking as sheriff of the county of Kings by virtue of a writ of *testatum fieri facias* in a suit of R. Wells against Daniel S. Griswold as the goods and chattels of Griswold, the same being in the possession of Griswold. The plaintiff demurred to this avowry, and the defendant joined.

J. Coit & H. W. Warner, for plaintiff, cited Bull. N. P. 53; 7 Taunt. 72; 7 Johns. R. 140; 20 id. 465; 1 Wendell, 109.

The principle that goods taken in execution are in the custody of the law, and cannot be taken out of such custody, when the officer has found them in, and taken them out of the possession of the defendant in the execution, applies only as between the defendant and the officer.

G. Griffin, for defendant, cited 7 Johns. R. 140; 14 id. 84; and insisted that the decision of the court in 20 Johns. 465, or at least of a majority of the judges in that case, was founded upon the assumption, that when the property was taken, it was in the *constructive* possession of the plaintiff in the replevin suit.

By the Court, SAVAGE. Ch. J. By the pleading it is admitted that at the time of the taking, the property was in the plaintiff, and the possession in Griswold, the defendant in the execution; and the question is, whether replevin lies? Since the case of *Pangburn v. Patridge*, (7 Johns. R. 142,) it has been settled that replevin lies where trespass *de bonis asportatis* will lie. The plaintiff must have property general or special, and possession either actual or constructive. In *Thompson v. Button*, (14 Johns. R. 84,) Chief Justice Thompson lays down the broad proposition, that as a general principle, it is undoubtedly true, that goods taken in execution are in the custody of the law, and cannot be taken out of such custody when the officer has found them in and taken them out of the possession of the defendant in the execution. In *Clark v. Skinner*, (20 Johns. R. 467,) Mr. Justice Platt has shewn very conclusively, that that proposition is correct only as between the defendant in such execution and the officer; and in such a case, it was applied in *Gardner v. Campbell*, (15 Johns. R. 401.) A variety of cases are stated by Mr. Justice Platt, in which an action of trespass would be a very inadequate remedy. The case of *Thompson v. Button*, was decided upon the principle of *Pangburn v. Patridge*, and was a case where the property taken by virtue of the execution was taken from the possession of the plaintiff in the replevin, and not from the possession of the defendant in the execution. The same principle laid down in *Pangburn v. Patridge* was recognized in the late cases of *Marshall v. Davis*, (1 Wendell, 199,) and *Hall v. Tuttle*, (2 Wendell, 475.) [The plaintiff having the property in the goods in question, had the constructive possession; for the property draws to it the possession.] The plaintiff therefore had the right to take possession at pleasure, and could have sustained trespass; and replevin and trespass in such cases are concurrent remedies.

The plaintiff is entitled to judgment on the demurrer with leave to the defendant to amend on payment of costs.

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v.
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German
v.
Swartwout.

GERMON VS. SWARTWOUT and others.

The specifications of the items for which a judgment is confessed under the sixth and seventh sections of the "act to extend the jurisdiction of justices of the peace," as well as the oath, must be in writing.

A constable, however, sued for neglecting to return an execution issued on such judgment, and his sureties, cannot avail themselves of an omission to comply with the requirements of the statute in these particulars.

THIS was an action of *covenant*, tried at the Rensselaer circuit, in November, 1826, before the Hon. WILLIAM A. DUNER, one of the circuit judges.

The action was against a *constable* and his sureties on a bond given for the faithful performance of the duties of the constable, who had neglected to return two executions delivered to him, issued on judgments obtained by the plaintiff, one against Enos for \$4,26, and the other against one Chapman for \$58,20. The judgment against Chapman was on confession before a justice, but was not in writing nor was any specification of the items of the plaintiff's demand filed. The defendant made oath that the plaintiff's demand against him was a true and just demand, but he did not state that the confession was a bona fide, and not made for the purpose of defrauding creditors. The presiding judge ruled that the statute had not been complied with in reference to the confession. The plaintiff excepted. The jury rendered a verdict for the plaintiff for \$2,63, the balance due on the execution against Enos. A motion was made by the plaintiff to set aside the verdict, and for a new trial.

J. L. Viele, for plaintiff.

J. Pierson, for defendant.

By the Court, SUTHERLAND, J. The specification of the items for which a judgment is confessed, under the *sixth* and *seventh* sections of the act of 1818, (Statutes, vol. 4, 80 c.) as well as the oath, should be in writing. The *fifteenth* section expressly requires the confession to be in writing, and to be signed by the party. The object of the act could not be accomplished if it were held that a *parol specification* was sufficient. The intention of the legislature was to prevent fraudulent confessions of judgment, by compelling the party to declare upon oath what the judgment was for, so that creditors might have it in their power to ascertain whether it was for a

real demand; and if not, to punish the party guilty of the fraud and perjury. This could not be effectually accomplished, unless a specification in writing was required. The judge, therefore, ruled correctly that the statute had not been complied with in the judgment confessed by Chapman to Germon. But in *Griffin v. Mitchell*, (2 Cowen, 548,) it was decided that the omission to take the oath and make the specifications required by this act, in judgments by confession, rendered the judgment void as to creditors only, but left it valid and binding as against the defendant. It necessarily follows, that neither the constable to whom an execution upon such a judgment is issued, nor his sureties, can avail themselves of this omission or defect in the judgment. If it was not absolutely void, the constable was bound to enforce the execution in the ordinary manner. On this ground, the plaintiff was entitled to recover the amount of the first judgment, as well as the balance on the second; and a new trial must therefore be granted.

UTICA,
August, 1829.
Coggeshall
v.
American Ins.
Company.

COGGESHALL vs. THE AMERICAN INSURANCE COMPANY OF
New-York.

THIS was an action on a policy of insurance, and came before the court on a case made by the parties. The policy bears date 18th October, 1826, and assumes the risk upon all kinds of lawful goods and merchandises laden or to be

Where a policy of insurance was effected upon goods and merchandises laden or to be laden on

board a ship for and during the term of six calendar months, without reference to any particular voyage, the risk to commence from and immediately following the loading of the goods on board of the vessel. *It was held*, that a trading voyage was evidently contemplated by the parties; that the policy was to be construed in the same manner as if a trading voyage had been expressed, with liberty to touch and trade at such ports and places on the globe as the insured should choose, subject to the accustomed and usual mode of transacting business at the several places visited by the vessel; and that however often the goods might be changed the policy would attach.

If goods, whilst in the transportation from the shore to a ship engaged in a trading voyage, are lost, the insurer is liable, if the means employed for such transportation are according to the known course of trade and established usage of the place where the goods are thus attempted to be laden on board the vessel.

It seems that it is not an established point, in this country, that the insurer would be discharged by the insured taking the goods in his own lighter for the purpose of landing them, if the goods are lost.

Under-writers may contract so far as to incur risks antecedent to the date of the policy.

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laden on board the good ship Governor Clinton, for and during the term of six calendar months, commencing on the 10th July, 1826, "beginning the adventure upon the said goods and merchandises, from and immediately following the loading thereof on board of the said vessel from 10th July, 1826, and so shall continue and endure until the said goods and merchandises shall be safely landed on 10th January, 1827, at noon." By a marginal note, the policy was extended for two months from 10th January, 1827, for an additional premium of one per cent. The sum insured was \$4000; the premium paid, three per cent.

The ship was engaged, at the date of the policy, in a trading voyage on the western coast of South America, and arrived off the port of Lambayeque, on that coast, on or about the 4th August, 1826. Lambayeque is a port of entry with a custom-house, and carries on an extensive trade, consisting chiefly of sugar, tobacco and *plata pina* or virgin silver. No ship can come nearer to the port than within about the distance of three miles. The only mode of carrying on trade with the port is, for vessels to lay off and on, or come to an anchor at the distance of about three miles, and to send their cargoes on shore and receive return cargoes by means of rafts with sails, called *balsas*, which mode of communication between vessels and the shore is usually safe, and accidents do not happen to the *balsas* more frequently than to ordinary lighters in the ports and harbors of the United States. This mode of communication with the port is familiarly known to all who trade to that coast. The use of *balsas* is not confined to Lambayeque, but extends to Guayaquil, Eaton, Sechusa and Payta, on the western coast of South America. The *balsas* are used at Payta and Guayaquil, though the water there would admit the use of ordinary boats, being considered more convenient and safe than ordinary boats; at Lambayeque, however, the surf is so violent as to render it dangerous to land or ship any cargo in ordinary boats. *Balsas* are made of balsa wood, which is nearly as light and buoyant as cork, by laying several tiers of logs above each other crossing at right angles, secured by lashings and floored on the top with split bamboo. They are navigated by the in-



habitants of the coast with great skill, expedition and safety, often proceeding along the coast in voyages of several hundred miles and going out of sight of land. They sail before the wind at the rate of five or six miles an hour, and beat against it at the rate of two or three miles an hour.

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The vessel having approached within about three miles of the port, the water being too shoal to admit of a nearer approach, the plaintiff, who was on board of the vessel during the voyage in the capacity of supercargo, together with his clerk and two seamen, went on shore for the purpose of purchasing and bringing on board of the vessel some vegetables, fowls and other provisions for the use of the ship, and also for the purpose of purchasing and bringing on board a quantity of *plata pina* or virgin silver. About four o'clock in the afternoon of 12th August, 1826, a *balsa*, having on board the plaintiff and his companions and a suitable number of men from the shore to navigate the *balsa* left *Lambayeque* for the ship laden with vegetables and fowls and other provisions for the use of the ship, and *ten baskets of plata pina*, nine of which were the individual property of the plaintiff, having been bought by him with the proceeds of his share of the outward cargo, for the purpose of being laden on board the ship. When the *balsa* left the shore the weather was fine and the sea appeared calm. The *balsa* proceeded without difficulty until she had got about half way through the breakers, when the sea increased greatly in roughness, and three very heavy seas in succession struck the *balsa* with so much violence, as to break one of her logs and loosen the fastenings of part of her cargo and wash over-board one of the baskets of *plata pina* belonging to the plaintiff, whereby it was totally lost. The roughness and violence of the sea were so great at the time of the disaster, as not only to endanger all the cargo laden on board the *balsa*, but also to jeopardize, in the most imminent degree, the lives of all the persons on board. When the *balsa* left the shore to proceed to the ship, the cargo on board was well fastened and secured, and the disaster and loss are attributable solely to the extraordinary swell and roughness of the sea, which unexpectedly occurred while the

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balsa was proceeding towards the ship, and could not have been prevented by human foresight or skill. The roughness of the sea was occasioned partly by a sudden rise of wind, and partly by the coming in of the tide. The value of the basket of *plata pina* belonging to the plaintiff which was lost, including costs and charges, was \$2170,79. There was no objection to the sufficiency of the preliminary proofs which were exhibited on 7th February, 1827. A stipulation was entered into between the parties as to the amount of the verdict, in case judgment should be given for the plaintiff.

G. Griffin, for plaintiff. The policy in this case contemplated a trading voyage, and covered not only the original cargo, but also any cargo that might be substituted therefor in the course of the traffic within the time limited in the policy. It is a policy on time, and in its very nature contemplates a trading voyage and substituted cargoes. The intent evidently was, that the successive cargoes on board the vessel during the continuance of the adventure, within the time limited, should be covered by the one policy of insurance. In adjudicating upon policies of insurance, courts look closer into the intent of parties, and are less controlled by the words of the instrument than in determining on any other contract. (1 Taunton, 474. 8 East, 373. 5 Maule & Selw. 6. 6 Mass. R. 197.)

The policy attached to the cargo on board the *balsa* in its transportation from the port to the vessel, as much so as if it had safely arrived and been stowed away in the ship. The *balsas* are the ordinary and only safe means of conveyance of cargoes at this particular place from the shore to the vessel. What was done, was done in the usual course and manner of doing it. The usages of trade incorporate themselves into the policy; (Phil. on Ins. 18; 3 Burr. 1707; 5 Barn. & Ald. 238;) and in the language of Lord Mansfield, in *Pelley v. The Royal Exchange Assurance Company*, (1 Burr. 348,) it is absurd to suppose, when the end is insured, that the usual means of attaining it are meant to be excluded.

J. Duer, for the defendants. The policy did not attach upon the *plata pina*, it not having been laden on board the

ship. The risk commenced from and immediately following the loading of the goods. The express terms of the contract exclude all enlargement by construction. Where words like those used in this case are employed, the goods must be on board the vessel, or the policy does not attach. (1 Marshall, 249. 6 Mass. R. 208.) The terms of the policy expressly exclude the risk of loading, and there is no evidence that there were any goods whatever laden previous to the attempt to load the virgin silver.

The policy will not include the proceeds of the original cargo. Had the goods laden on board the vessel been insured from one place to another, the policy would have attached only to the goods on board at the time of effecting the insurance; and because time is substituted for places, no broader construction can be given to the contract. How could the insurers calculate the risk of the adventure, without being informed of the dangers of the trade in which the plaintiff chose to embark? At the time of the loss of the *plata pina*, the connection of vessel and cargo had not commenced. The goods to be covered by the policy must belong to the vessel, and be under the control of the master. In this case they were under the direction of the owner, never reached the ship, and consequently were not under the control of the master.

Griffin, in reply. The *plata pina* was purchased with the proceeds of the plaintiff's share of the outward cargo; consequently, previous to the disaster, there was a cargo laden on board the vessel. As to the dangers of the trade in which the plaintiff engaged, the defendants have no cause of complaint. By entering into a policy on time, all reference to place is excluded; and as long as the plaintiff did not embark in an unfrequented and unusually hazardous trade, the policy is operative and the insurers are liable.

By the Court, SAVAGE, Ch. J. The policy in this case being on time, is subject to the rules of construction in other cases, except as to the commencement and termination of the voyage. The risk is made to commence on the loading

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the goods on board the vessel on and from the 10th of July, 1826. The policy was entered into in October following. But parties may contract, and have done so in this case, so as to incur risks antecedent to the date of the contract. The risks commenced upon goods on board the vessel on the 10th July, provided any were then on board. The evidence on that point is, that the nine baskets of *plata pina* which belonged to the plaintiff, were purchased with *his share of the outward cargo*. The plaintiff's goods on board, then, must have been of much greater value than the amount insured; and this I think is conclusive, being uncontradicted, to shew that the policy attached upon the goods with which the *plata pina* was purchased.

Did the policy attach to the *plata pina*, or was the voyage ended? Where the adventure was to run six months, with the privilege to the insured to extend it two months longer, a trading voyage was evidently contemplated by both parties; and it cannot be fairly construed to be at an end at the first port which the vessel makes, but is to continue in the same manner as if a trading voyage had been expressed, with liberty to touch and trade at such ports and places on the globe as the insured shall choose, subject to the accustomed and usual mode of transacting business at the several places visited by such vessel; and however often the goods may be changed, the policy attaches. Any other construction would suppose extreme folly and weakness in the insured. The idea that a person engaged in shipping goods intends to sail upon the ocean for six or eight months with the goods, and return them in specie to the port of departure, or any other port without the liberty of disposing of them, is too preposterous to be for a moment admitted.

In *Grant v. Paxton*, (1 Taunton, 474.) Mansfield, chief justice, speaking of the case of *Grant v. Decarvin*, where the policy was in terms similar to what I contend was the meaning of the parties in this case, says, "It was on goods laden in London, and to continue on the *same* goods, which, literally taken, would be absurd, because goods are taken out for the purpose of trading and barter, not to be brought home again in specie;" and that consequently the captain (the

agent of the insured) had a right to trade with his goods as often as he pleased, and the insurance attached upon the goods acquired by him in the course of his trading. "If the goods described in the policy are exchanged at any port in the course of the specified voyage, the policy will apply to the substituted goods, without any express provision for this purpose, where the insurance is to several ports, which seems to imply the liberty of exchanging the goods." (Phillips on Ins. 69, citing Valin, 2 vol. p. 78, n. t. a. 27.) A policy on time simply, where no ports are mentioned, must, as already remarked, necessarily imply a trading voyage, which again implies liberty to dispose of the goods insured. It seems to me, therefore, no doubt can be entertained that the policy attached to the proceeds of the goods insured.

It is objected, however, that the substituted goods were not on board of the vessel, but were lost in their passage from the shore to the vessel in the plaintiff's own lighter. Could we reasonably entertain the opinion that these were the first goods of the plaintiff on board the vessel, or attempted to be put on board subject to the policy, then undoubtedly the policy would never have attached. By the terms of the policy, the adventure commenced from the *loading* the goods on board on or after the 10th July; but as the plaintiff had previously goods on board, with the proceeds of which the *plata pina* was purchased, the supposition cannot be admitted. As the transaction in question cannot, therefore, be considered the beginning or the termination of the adventure, the cases referred to, shewing that where the insured has taken his goods into his own possession in his own lighters the risk ceases, can have no application to this case. Where the defendants insured the plaintiff's goods upon a trading voyage, the insurance was intended to cover those goods, and any other goods, the property of the plaintiff, procured with their proceeds, until the expiration of the term insured for. As the goods were not on board the vessel when lost, the liability of the defendants must depend upon the known course of trade and established usage, with which insurers are supposed to be conversant. Upon this principle, the plaintiff recovered in *Pelly v. The Royal Exchange Co.* (1 Burr. 341,) for the sails,

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tackle and apparel of the ship while in a *bank saul* or ware house built for their protection upon an island, while the ship was refitting; it being usual for vessels in the same trade to clear and refit their vessels in that place. So, also, the case of *Tierney v. Etherington*, referred to by Lord Mansfield in the former case, (1 Burr. 348,) the insurance was on goods in a Dutch ship from Malaga to Gibraltar, and from thence to England or Holland: the goods might be unloaded at Gibraltar, and re-shipped in an English ship for England or Holland. When the ship arrived at Gibraltar, there was no British ship there, and the goods were put into a store ship, which was considered as a ware house, and were lost in a storm. Ch. Justice Lee said, the construction of the policy should be according to the course of trade in this place, (meaning Gibraltar) and this appears to be the usual method of unloading and re-shipping in that place when no British ship was there. So in this case, it appears that the *balsas* were the usual and indeed the only means of loading and unloading vessels; and even if we were to adopt the doctrine that the underwriter is discharged by the plaintiff taking his goods in his own lighter, (which is certainly not an established point in this country,) still it does not apply in this case, 1. Because this was not the termination of the adventure; and 2. Because the *balsa* was not the *balsa* of the plaintiff, although employed by him and paid by him; yet as to him it was a public lighter. Whether it belonged to the custom-house at that place does not appear; but if not, it was a conveyance public to all who chose to transmit goods to or from the shore, and was, as to its navigation, not under his (the plaintiff's) control. This opinion is fortified by the opinion of the court in *Parsons v. Mass. Fire & Marine Ins. Co.* (6 Mass R. 202, 8,) where Sedgwick, justice, says: "For although in the commencement of the voyage the insurance did not attach upon the goods while in the act of transportation in boats to the brig, nor until they were on board, and this from the terms of the policy, yet during the voyage the goods were as much protected by the policy in the boats, while they were employed as auxiliary to the legitimate purposes of the voyage, as they were on board the

ship. For all the purposes of the voyage, boats so employed are very reasonably considered as part of the ship." These remarks are applicable here; for though the words of the policy in this case are not the same as those in the case last referred to, yet I have considered the policy equally comprehensive in the construction which must be given to it, if it must be supposed to have any rational meaning.

The plaintiff is entitled to judgment.

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H. D. SEWALL, survivor, &c. vs. CATLIN.

THIS was an action of slander tried, at the New-York circuit in October, 1827, before the Hon. REUBEN HYDE WALWORTH, then one of the circuit judges. The declaration alleged special damage.

The first witness called by the plaintiff was Samuel Whittemore, who testified that early in the morning of the fifteenth day of September, 1825, he met the defendant in the street, and put to him the question which was then very common, "Were there any failures yesterday?" (failures being very frequent in those days in consequence of the rage for cotton speculations,) to which the defendant answered, "Not that I know of; but I understand that there is trouble with the Messrs. Sewalls." On witness expressing his confidence in the solvency of the Messrs Sewalls, the defendant observed, "I can't tell whether it is true or not." From what the defendant said the witness supposed he intended to convey the idea that the Sewalls either had failed or would fail. This

Where, in answer to an inquiry, "Were there any failures yesterday?" it was said, "Not that I know of, but I understand that there is trouble with the Messrs. S., it was holden that such words being spoken of the plaintiffs as merchants, were actionable in themselves.

Any words which in common acceptance imply a want of credit or responsibility, when spoken of a merchant, are actionable.

Where such words were spoken by a defendant, evidence that another person heard the report that the plaintiffs had failed, and in consequence withdrew from them business to a large amount, is inadmissible in support of a charge for special damage, unless the report thus acted upon is traced to the defendant.

A bank director is not justified in making a communication to a co-director in the public streets, affecting the credit or responsibility of a merchant, where there is no evidence of such communication being confidential. At a meeting of the board of directors, he would be justified in communicating to his associates any report which he might have heard in relation to the solvency or circumstances of the customers of the bank, or probably of any other person. His motive in such case would be presumed to be innocent, which presumption could only be repelled by proof of express malice.

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part of the testimony was objected to, but admitted by the judge as proper in support of the charge of special damage : the judge expressing his opinion that the words were not in themselves actionable. The witness further testified that he was a director of the Delaware and Hudson bank ; that the Messrs. Sewalls had notes running there which he had used his influence to have discounted, and therefore felt anxious to ascertain whether there was any truth in the report. He inquired of Mr. Heyer, the cashier of the New-York bank, whether there were any failures the preceding day, and on his answering that he knew of none, witness communicated to him the substance of what he had heard from the defendant. The defendant also was a director of the Delaware and Hudson bank, and president or cashier of another bank. The witness said that he did not think that the defendant was actuated by malice towards the Messrs. Sewalls in making the communication to him, and that he, the witness, did not know but that it might be the duty of one bank director to give such information to another.

Robert Gracie, another witness for the plaintiff, testified that on the sixteenth day of September, 1825, the mercantile house of Rogers & Gracie, of which he was a member, held the note of the Messrs. Sewalls, and offered it with the indorsement of his house for discount at the New-York bank : it was not discounted, but handed back by Mr. Heyer, the cashier, who told the witness that the Messrs. Sewalls had failed. Witness related to his partner what the cashier had said.

The plaintiff offered to prove by N. G. Carnes, another witness produced by him, that he heard the report that the Sewalls had failed, and that in consequence thereof, his house took away from them business worth \$1500 a year ; and that he heard the report as coming from the house of Rogers and Gracie. This evidence was objected to unless it was shewn that the report did in fact come from Rogers and Gracie. The judge decided that the evidence was inadmissible unless the report could be traced to the defendant ; that where the plaintiff claimed general damages in consequence of a slander either started or repeated by the defendant, the



jury in estimating such damages, might always take into consideration the probable effect of such slander, and give damages accordingly; but to enable the plaintiff to recover for any specific injury which he had sustained, it was necessary for him to trace the report which caused the injury to the defendant. The plaintiff next offered to prove that a report that the Messrs. Sewalls had failed was current in the city immediately after the conversation between the first witness and the defendant, and that in consequence of such report, the plaintiff sustained the special damage laid in the declaration; this evidence was also rejected. The plaintiff rested, and the judge directed a nonsuit to be entered. A motion was now made to set aside the nonsuit.

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*J. Blunt*, for plaintiff. The words were in themselves actionable, imputing to the Messrs. Sewalls a want of credit as merchants. (Starkie on Slander, 117.) The fact that the defendant and the witness to whom the communication was made were both directors of the same monied institution, furnishes no excuse, under the circumstances of this case. The communication was made in the street, and not at a meeting of the board of directors where the defendant might have conceived it his duty to give such information as he possessed in relation to the parties.

The defendant is liable for the consequences naturally resulting from the speaking of the words. It was not necessary to trace the report, in its progress, from the defendant to the person who withdrew his business from the plaintiff, by means of which he sustained the special damage. (Starkie on Slander passim. 2 Starkie's Ev. 850. 3 Wils. 186. 5 Binney, 221.)

*W. Slosson*, for defendant. To maintain this action it must be shewn that there was *malice* in the defendant. (Starkie on Slander, 219. 2 East, 425.) What was said by him was qualified: he could not say whether the report was true or not, and the witness expressly screened him from any malicious intent; the malice, therefore, instead of being proved was negatived.

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The defendant was under a moral obligation to communicate to his co-director what he had heard relative to the circumstances of the Messrs. Sewalls, and being under such obligation, he is not liable to an action unless express malice is shewn. (3 Johns. R. 180. 1 T. R. 110.)

The proof of special damage was properly rejected. The defendant was not accountable for the speaking of words occasioning special damage to the plaintiffs, unless it was shewn that such speaking was caused by what had been said by him.

*R. Sedgwick*, in reply. The principal question is, was the occasion such as to justify the speaking of the words complained of? Allowing that the defendant had the right to make the communication to the witness, at a proper time and place, it is denied that he had the right to speak on the subject in the public street; and at all events, it should have been submitted to the jury to say whether the defendant should be considered as acting officially in making the communication, or as maliciously giving currency to a rumor injurious to the plaintiffs.

*By the Court*, SUTHERLAND, J. The defendant was not justified in speaking the words in question on the ground that he and the witness to whom they were addressed were both directors of the same bank. They were not spoken at the board of directors with a view of communicating information, which might properly influence the operation of the board. A bank director would undoubtedly be justified in communicating to his associates any report which he might have heard in relation to the solvency or circumstances of the customers of the bank, or probably of any other person. The legal presumption would be that his motive in making the communication was to guard the interest of the institution to which he belonged; and it would be incumbent on the plaintiff, under such circumstances, to repel this presumption by proof of *express* malice. (2 Phil. Ev. 109, note a. Starkie on Slander, 228. 3 Johns. R. 180. 1 T. R. 110. Burr. 2425. Bull. N. P. 8.) But where the words are spoken in the street or market place, and there is nothing to shew that they were intended as a confidential communica-

tion from a bank director to his associate, the party uttering them can derive no protection or advantage from the circumstance that he is a bank director. Bank directors have no peculiar privilege to slander their neighbours.

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The evidence of N. G. Carnes, that he heard the report that the Sewalls had failed, and that in consequence thereof his house took from the Sewalls business worth \$1500 a year, was properly rejected. This evidence was offered for the purpose of showing the *special damage* sustained by the plaintiff from the words spoken by the defendant. There was no evidence that the report heard by the witness came from the defendant; it was not traced to him. The judge decided correctly, that the plaintiff could not recover for any special damage, unless he could trace the report which occasioned the damage to the defendant; that where the plaintiff claimed general demands only in consequence of a report started or repeated by the defendant, the jury might take into consideration the probable effect of such slander, and give damages accordingly; but where a specific injury is alleged, the report which occasioned it must be clearly traced to the defendant.

I am inclined to think the words were actionable in themselves being spoken of the plaintiffs as merchants. The witness inquired of the defendant, "If there were any failures yesterday; to which he replied, "Not that I know of, but I understand there is trouble with the Messrs. Sewalls." This answer in connection with the interrogation, was most obviously calculated to convey an injurious impression in relation to the mercantile standing and credit of the plaintiffs. The witness had heard of no failures, but he had heard that the Sewalls were in trouble. Every person would understand from this expression, when used in reply to such a question, that the Sewalls were embarrassed, were very hardly pressed and would probably fail, and such was the sense in which the witness understood them. Any words which in common acceptance imply a want of credit or responsibility, when spoken of a merchant, are actionable. (Starkie on Slander, 117, and cases there cited. 2 Phil. Ev. 100. 5 Johns. R. 476. 17 id. 218, and cases there cited.)

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Whether they were spoken maliciously or not, was for the jury to determine. The plaintiff should not therefore have been nonsuited. The judge at nisi prius held the words not to be actionable, and as the plaintiff failed to prove his special damage, nonsuited him on that ground.

The nonsuit must be set aside and a new trial granted.

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THE UTICA INSURANCE COMPANY VS. CADWELL, BADGER  
and KING.

Where an insurance company on being applied to for the loan of a sum of money, agree to make the loan on condition that the borrower will effect an insurance with the company, and such insurance is made and a premium paid not exceeding the usual rate of charges in such cases, such facts do not amount to evidence of usury.

The Utica Insurance Company have a right to invest their *surplus funds* in loans. But having called in a part of their capital for the express purpose of making loans in a particular way, viz. by the issuing of checks in the shape of bank notes, it was held, that loans thus made are in violation of the *restraining act*, and that a note taken upon such loan is void.

The money lent may however be recovered under the common count, and *checks* drawn, received as money, and duly paid, will be considered *money*. The recovery however, in such case, being on the *contract* as distinguished from the *security*, an action cannot be sustained against the borrower and his sureties, the sureties not being parties to the contract.

A corporation may be proved by an exemplification of the act of incorporation and acts of user under it.

Reasonable notice must be given to produce books or papers before the time when the cause may be tried. What shall be deemed reasonable notice depends upon the circumstances of the case. Whether secondary evidence shall be admitted depends upon the discretion of the judge.

It is no objection to the competency of a witness in an action by a monied institution that a few days before the trial he had sold out his stock, although he stated that he supposed he could purchase it back if he chose; he testifying that the transfer by him was without any agreement, either express or implied, that the stock should be conveyed.

incorporation passed in March, 1816, and evidence of *user* under it. The note was given on a loan of \$1000, made by the plaintiffs to Cadwell, one of the defendants, the other defendants having signed as sureties; the payee was a nominal party. In 1825, the Utica Insurance Company called in stock to the amount of \$200,000, which they deposited in the Tradesman's Bank, in the city of New-York, and received interest for the deposit. These funds were not employed in the business of insurance, but were used in making loans. In November, 1825, the company had loaned out \$50,000 at Utica, and they also loaned money in New-York. Until June, 1825, they made their loans in bank bills, but after that time they issued checks, which were on silk paper, resembling bank notes, and their loans were made in checks and bank bills. The checks drawn on the Tradesman Bank were always at *par* in city and country, and were esteemed better than country bank bills, because paid in New-York. They were always paid when presented. On the 30th August, 1825, a negotiation was commenced between Green, the payee of the note and secretary of the company, and Cadwell, one of the defendants, relative to a loan. Cadwell was required to make a note with surities, and to effect an insurance; and was given to understand that a renewal of his note would depend upon his giving a good circulation to the paper of the company, and making frequent exchanges with the company. These terms he agreed to; he effected an insurance for one year on a dwelling house and other buildings to the amount of \$2,900, and paid a premium of \$21,60, which was rather lower than the usual rate of charging for insurance. The money was loaned in the usual way in giving checks, and the note taken.

The defendants called for the production of the books of the company, to shew the time and manner of the loan in this case, and the proceedings of the stockholders in relation to the discontinuance of the business of the company. Notice to produce the books was given on the 5th April, at 4 P. M. The circuit commenced on the 7th April, at 10 A. M.

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The books were in New-York, where the company have an office, and where the principal part of the stockholders reside. The company, however, have also an office in Utica. A journey in that season of the year may be performed from Utica to New-York and back in four days. The judge sustained the objection, and decided that the defendants were not entitled to give parol testimony of the contents of the books.

A question arose, on the trial of the cause, as to the competency of a witness called by the plaintiffs. On a preliminary examination, he testified that a few days before the trial, he was a stockholder and director of the company; that he had sold his stock to a person who was able to pay for it; that there was no agreement, express or implied, that he should take the stock back again, but he supposed he could buy it back if he chose so to do. The judge decided that the witness was competent.

The evidence being closed, the counsel for the defendants insisted that the proof of the existence of the corporation was defective, inasmuch as the plaintiffs had not shewn a compliance with the requirements of the act in the organization of the company; that the loan was usurious, the insurance being effected as a mere cover to evade the statute, and the insurance and the other onerous terms imposed upon the borrower giving the lender more than interest at the rate of seven per centum per annum; and that if not usurious, it was a banking transaction in violation of the *restraining act*, and so requested the judge to charge the jury. The judge charged the jury that the plaintiffs were entitled to recover if they were satisfied that the premium paid on the insurance was not greater than was customary in such cases. The defendants excepted. The jury found for the plaintiffs the amount due on the note. A motion was now made to set aside the verdict.

*J. A. Spencer*, for defendants. The loan in this case was a banking transaction, and as such the note is void under the *restraining act*. Whatever the devices were to evade the

statute, it is manifest from the facts of the case that the company were doing business as a bank. The cases of this same company against Scott, (19 Johns. R. 1,) and against Kip, (8 Cowen, 20,) settle the whole law on this subject.

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The note also was usurious. The requirement that the borrower should effect an insurance with the company and pay them a premium, taken in connection with the loan, is evidence that this was a mere shift to evade the statute, and should have been distinctly submitted to the jury.

The notice to produce the books called for, was sufficient. It was no excuse that they were in New-York; they should have been at Utica.

The sale of stock by the witness who was objected to by the defendants, was not bona fide. His interest was the same after as before the transfer. It was a device to enable him to be a witness. The sale of his stock did not divest him of his character of director.

*S. A. Foot*, for plaintiffs. There is no restriction on this company as to the place where they shall conduct their business, except as to the election of the directors of the company, which, by the act of their incorporation, must be at Utica. The company had a surplus fund deposited in the Tradesman's Bank in New-York. They had a right to loan such fund on personal security, and to make their loans in checks on the bank where their deposit was made.

There was no usury in the transaction. The plaintiffs were incorporated as an insurance company, and had a right to solicit business. There is no pretence that the premium paid exceeded the ordinary rate. The risk was incurred, and a consideration passed for the premium. The requirement to keep checks in circulation, and to make exchanges, is no evidence of usury. The defendants did not ask the judge to submit this question to the jury; they only desired him to decide the law. He did so, and they cannot now complain that the question was not left to the jury.

The parol evidence of the contents of the books was properly excluded. The notice was but forty two hours, given at Utica, to produce books which were in New-York. It was

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too late for the first day of the circuit, when they were required to be produced; and the plaintiffs were not bound to take measures to produce them at a subsequent day, on the supposition that they might be obtained before the cause was reached. The witness who was objected to was not interested; he could neither be a gainer or loser by the event.

*By the Court, SAVAGE, Ch. J.* I think the judge decided correctly in rejecting the parol proof. Where papers are at a distance, the party or his attorney is not bound, upon notice, to leave court and his business, and go or send for books or papers, unless he has reasonable time before the cause may be tried. It happened that between the time of serving the notice and the trial there was time to have sent to New-York; but the attorney could not know that the cause would not be reached, or that the circuit would last till he could obtain the books. The judge at the circuit must exercise a reasonable discretion as to admitting secondary evidence, where the primary is withheld after notice to produce it. The party should have reasonable notice; and what is reasonable must depend upon circumstances. Where the paper or book wanted is in court, or near by, a notice after the trial has commenced may be sufficient; but where they are at a distance, a suitable time should be allowed.

The objection to the competency of the witness was properly overruled. He had no interest; he had sold *bona fide* his stock, and was competent. This very point was decided in *The Bank of Utica v. Smalley*, (2 Cowen, 777,) where the witness Colling assigned his stock after he was sworn in the cause, and was then held to be a competent witness. The witness could not be a director without being a stockholder.

The principle grounds of objection, however, are, 1. That this loaning was a cover for usury; 2. That it was a banking transaction, in violation of the restraining act. The judge at the circuit decided, and so charged the jury, that the plaintiffs had sufficiently proved themselves a corporation; that the loan was made from their surplus funds; that the plaintiff's checks paid to the borrower were the same as money, as they were always paid when presented; that



there was nothing improper in the insurance of the defendant's buildings at the usual rate, that being part of the business of the company, and that the note was not therefore usurious; and that the plaintiffs were entitled to recover. To the whole of this charge the defendants excepted.

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The judge was undoubtedly correct, according to the decisions of this court, in deciding that the plaintiffs had proved themselves a corporation; and that they had a right to loan money by way of investing their surplus funds. I am of opinion, also, that he was right in saying that there was no usury in the transaction. The insurance was a lawful act, and the principal business of the plaintiffs; and as it was made at the usual rates of premium, there could be no shift or contrivance in this transaction whereby the defendants were made to pay more than seven per cent. interest on the loan made. The defendant Cadwell paid the plaintiffs \$21, 60, not for the loan of the money which he borrowed, but for the risk which the plaintiffs incurred in insuring his buildings against fire. The defendant received an equivalent for his premium independent of the loan.

I am not equally clear that the transaction in question was justifiable within the restraining act, and the rights of the plaintiffs under their charter, as expounded by this court.

By the restraining act, no person unauthorized shall become a proprietor of a fund for the purpose of issuing notes, receiving deposits, making discounts, or transacting any other business which incorporated banks may or do transact by virtue of the acts of incorporation. Now it appears in this case, that a part of the capital not wanted for the purpose of insurance, and not a part of their profits, was called in for the express purpose of being loaned in a particular way; the principal to be deposited, and checks to be drawn for the purpose of circulation. Thus a fund was virtually set apart by the plaintiffs for the purpose of issuing notes; not technically notes, but bills of exchange, which are substantially notes, for circulation, as bank notes. These checks were not intended to be presented for the purpose of withdrawing the deposit, because they received interest on the deposit; and if they can also receive interest on their checks, they have all

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the profits of that part of banking business which consists in issuing notes, and more also; for banks receive no interest on the capital which lies in their vaults, but only on their credits and notes in circulation. It seems to me, therefore, that the issuing checks prepared and intended for circulation like bank notes, not being authorized by their charter, was a violation of the restraining act. The consequence is, that the note is void, and the plaintiffs cannot recover upon it.

But it has been decided in the case of these plaintiffs against Kipp, (8 Cowen, 20,) that though the security is void, the contract of loan is not void. If therefore the plaintiffs have lent the defendants *money*, they may recover upon the count for money lent. It appears in this case that a negotiation took place between the defendant Cadwell and the plaintiffs for a loan. It was effected, and the other parties (defendants) are considered as surities. The plaintiffs had money in deposit in New-York, and drew their checks upon that fund. These checks authorized the holder to draw the money at pleasure, and it appears that all the checks presented to have been paid. Suppose an individual lends his check when he has funds, and it should appear that all his checks have been paid, the conclusion without evidence to the contrary, is, that the check has been paid. It is therefore money. Had there been but one check given to Cadwell, under the other circumstances appearing in this case, there could be no doubt that, as between him and the plaintiffs, the transaction was a loan of money; and as between them, it can make no difference whether there was one check or one hundred. It seems to me, therefore, that there was a loan of money to Cadwell, but not to the other defendants. There is no liability upon them, but upon the note. They have had no other transactions with the plaintiffs.

This is a joint action against three defendants, against two of whom no cause of action is shewn. The plaintiffs have therefore failed. A new trial must be granted; costs to abide the event.

END OF AUGUST TERM.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF NEW-YORK,

IN OCTOBER TERM, 1829, IN THE FIFTY-FOURTH YEAR OF OUR INDEPENDENCE.

GIBBONS, executrix, vs. LARCOM.

MOTION to set aside *capias ad satisfaciendum* for irregularity. The *ca. sa.* was issued on the 29th day of July last, tested on the 18th day of May, and returnable on the third Monday of October then next. The defendant was arrested on it on the 14th day of August.

A *ca. sa.* with a term intervening between its teste and return, is irregular.

*Lansing & Frothingham*, for defendant, cited 1 R. L. 318.

*J. Edwards*, for plaintiff, insisted that a term may intervene between the teste and return of a *ca. sa.* without affecting its regularity; though it would be otherwise in the case of *mesne* process. (2 Bacon's Abr. tit. Execution, C. 1. 1 Archbold's Pr. 259. 1 Sellon, 521.)

*By the Court*, MARCY, J. It is not necessary by the practice of the king's bench in England, that a writ of execution should be made returnable in the term next after that in which it is tested; if a term intervene, it is not material.

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(Archbold, tit. Execution, teste &c.) But we have a statutory regulation which conflicts with this practice, (1 R. L., 318,) regulating the teste and return of process in this court. It has been supposed by counsel, that this statute related only to *mesne* process; this court however regarded it otherwise in *Gordon v. Valentine*, (16 Johns. R. 145,) where a *fi. fa.* and *ca. sa.* tested otherwise than directed by the statute, were held to be irregular. This provision in the new revision of the statutes, (2 R. S. 197,) is explicitly applicable to final as well as to *mesne* process. The motion is granted unless the plaintiff pays the costs of this motion, in which case he has leave to amend.

THE PEOPLE, on the relation of S. Hale, and J. McClure vs.  
ONONDAGA C. P.

A party resisting a mandamus in this court, by requiring the relators to plead or demur, and subsequently joining in demurrer, is liable to the costs of the demurrer, on judgment being rendered in favor of the relators.

MOTION for costs against party defending in a case of mandamus. Hale and McClure had obtained an alternative mandamus to the Onondaga common pleas, to vacate a rule in an appeal case granted by them, in favor of one Edmund Millard, the appellant below. On the coming in of the return to the alternative mandamus, the relators were required on the motion of Millard to plead or demur. They demurred and served a copy of the demurrer on the attorney of Millard, who joined in demurrer, signing the joinder as "Attorney and counsel for Edmund Millard appellant, on behalf of the judges of the court of common pleas in and for the county of Onondaga." Subsequently a judgment was rendered in this court in favor of the relators and costs taxed, which having been demanded of Millard and not paid, an attachment was now asked for.

H. F. Mather, for relators.

By the Court, MARCY, J. This case is distinguishable from that of *The People v. Jefferson C. P.* (2Wend. 301.) There the parties opposing the mandamus had done no act

beyond resisting the issuing of a peremptory mandamus on the coming in of the return; here the party opposing applied for a rule on the relators to plead or demur, and on being served with a demurrer put in a rejoinder. He thereby became an actor in the suit, and must be responsible for the costs, which he is ordered to pay, or to shew cause by the first day of the next term.

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LINACRE vs. LUSH.

**TAXATION of costs.** The plaintiff having paid costs to the defendant for not proceeding to trial pursuant to notice at a circuit, antecedent to that at which the cause was tried and a verdict found for the plaintiff; in making up his bill of costs charged the defendant with the plaintiff's costs of the first circuit. This was objected to by the defendant, and the question submitted to the court, who said that the plaintiff was not entitled to such costs.

Where a plaintiff pays costs to a defendant for not proceeding to trial at a circuit court pursuant to notice, he cannot afterwards charge the defendant with the plaintiff's costs of that circuit, though he subsequently obtains a verdict.

*J. McKown*, for plaintiff.

*S. S. Lush*, for defendant.

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LAWRENCE vs. BUSH, administratrix, &c.

**MOTION to strike out plea of *puis darrein continuance*.** This suit was commenced at the last May term. The declaration contained the common counts for goods, wares and merchandizes, sold and delivered the intestate in his life time. The defendant pleaded the general issue and *plene administravit præter*, \$80. The plaintiff replied, admitting the truth

After an administratrix has pleaded the general issue and a plea of *plene administravit præter* a certain sum, and the plaintiff in the action has repli-

ed admitting the truth of the second plea, praying judgment, &c. a plea *puis darrein continuance*, setting forth a judgment confessed by the administratrix in a suit commenced, since the action in which the plea is interposed was at issue and noticed for trial, will be received and considered good.

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of the second plea, praying judgment of the \$80, in part satisfaction of his damages, and for the residue to be levied of the goods and chattels, &c. *quando acciderint*; but staying such judgment until the trial and determination of the issue between the parties. A notice of trial was then served for the Monroe circuit, which commenced on the 31st day of August. On the second day of the circuit the plaintiff was served with a plea of *puis darrein continuance*, setting forth a judgment obtained in this court at the last August term, by one C. B. Hamilton, against the defendant as administratrix, &c. for \$134.89, averring that the defendant had fully administered, &c. except as to \$80, and that such sum was not sufficient to satisfy such judgment, &c. The *capias* in the suit of Hamilton was returnable at the last August term; it was issued after the plaintiff in this cause had replied to the plea of *plene administravit præter*, and had given notice of trial for the Monroe circuit, and the judgment set forth in the plea *puis darrein* was obtained on a *cognovit* given by the defendant on the 31st day of August.

*S. B. Jewett*, for plaintiff, insisted that the defendant, in the suit of Hamilton, should have plead her former plea of *plene administravit* except as to the \$80, and as to that sum that she had confessed it in a former action. He cited 1 Salk. 310; Dougl. 452; 1 Saund. 334, n. 8.

*W. Groves*, for defendant.

*By the Court*, MARCY, J. An executor's or administrator's hands are tied by a suit as to *paying* debts of equal degree to that on which the suit is commenced; but he may *confess a judgment*. This is justly deemed an anomaly in the law, and courts have been called on to explain the reason of of it. This is done by Lord Ellenborough, in the case of *Tolputt v. Wells*, (1 Maule & Selwyn, 395.)

The suit ties up the hands of the administrator or executor, who cannot accelerate the proceedings in it, nor can the creditors of the intestate generally, who are interested in the administration going forward, do any thing to advance it. Courts therefore allow of the confession of a judgment to

relieve the executor or administrator from a situation embarrassing to him and injurious to the creditors.

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But a creditor is not to be deprived of the fruits of his diligence ; and he can secure them, it is said by Le Blanc, justice, in the case cited from Maule & Selwyn, by compelling the executor or administrator to plead ; and if time is asked for that purpose, it is given only on condition of not confessing judgment. This condition is imposed because the law entertains a jealousy that the right to confess judgment may be improperly used. The remark of Le Blanc seems to imply, that if the executor does plead, he cannot afterwards confess a judgment ; but Bayley, J., in the same case, is more explicit on this point. He says, "An executor may indeed, pending an action against him by one creditor, confess a judgment to another in equal degree, *provided he do it before he is compelled to plead to the action* ; because up to that extent the law allows him to give a preference."

Where the administrator pleaded *plene administravit* except £48, and to another action pleaded *plene administravit præter* the same sum, and as to that sum that he had confessed it in another action in a plea at the same term, such latter plea was allowed to be good. (*Waters v. Ogden*, Dougl. 452.) In the case of *Prince v. Nicholson*, (5 Taunton, 333, 665,) the court, with considerable difficulty, brought themselves to decide in favor of a plea *puis darrein continuance* by an executor, (after he had pleaded the general issue,) setting up judgments recovered since the general issue pleaded, and in suits commenced subsequent to that in which the plea was put in. Ch. J. Gibbs considered it a forcible objection that a judgment recovered in an action commenced since the beginning of the plaintiffs suit could not be pleaded ; but he obviated the objection by adverting to the hardship to which the executor would be exposed by disallowing the plea.

So far as the case in Maule & Selwyn is an authority against allowing an executor to plead *puis darrien continuance* a judgment recovered after he had pleaded the general issue, it is overruled by the case of *Prince v. Nicholson*. Ch. J. Gibbs stated that it did not appear whether the judgments pleaded *puis darrien continuance* in that case were recovered

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by *nil dicit*, confession or after verdict. If by confession it was a case like this ; but whether by confession or otherwise, the court considered the same principle applicable.

The reasons for allowing a plea like that under consideration, on reflection, will be found to be more satisfactory than they appear at first view. The administratrix in this case may have felt it her duty to put the plaintiffs to the proof of their demand, and she may have been satisfied with the justice of that for which the second suit was brought. She could not plead, as the defendant did in the case of *Waters v. Ogden*, that she had administered all but the eighty dollars, and that she had confessed that sum in this suit, because she had pleaded the general issue as well as the plea of *plene administravit præter*. She could not forbear to plead, because a default might have been taken against her, and that would have been an acknowledgement of assets. (*Platt v. Robins*, 1 Johns. C. 276.) This view of the situation of the administratrix induces me to approve of the principle of the case of *Prince v. Nicholson*, and to apply it to the case before us.

This question should have been presented by pleading, and not on motion ; but having examined it, we shall dispose of it on this application.

Motion denied.

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FOBES vs. MEIGS.

Where a plaintiff in an action of assumpsit recovers a sum not carrying costs, and the defendant is entitled to costs, the defendant in the first instance cannot make up the record of judgment.

TAXATION of costs. The plaintiff in an action of assumpsit recovered a sum *less than fifty dollars*. The defendant in his bill of costs charged for making up a record of judgment, which was allowed by the taxing officer ; from which taxation there was an appeal to this court.

*Bacon & Ford*, for plaintiff.

*J. Edwards*, for defendant.

His course is, to have his costs taxed, and to require of the plaintiff to insert the same in the record, or, if the record be already made up and filed, to enter a suggestion on it, stating the taxation of the costs, and the amount thereof,



*By the Court, MARCY, J.* In England, where a plaintiff recovers a sum not carrying costs, and the defendant in consequence is entitled to costs, the practice is, to move the court for leave to enter a suggestion to that effect upon the record, to have the costs taxed and marked upon the postea and issue roll. Here, where it appears upon the face of the postea that the defendant is entitled to costs, it is not necessary to make such motion. By our statute, in a case like this, if the plaintiff does not recover above the sum of fifty dollars besides costs, he does not recover costs, but pays costs to the defendant; and it is provided that "the defendant shall have judgment and execution for the same in like manner as if a verdict had been given for him." (1 R. L. 344.) From the phraseology of the act, it would seem that a defendant was authorized to make up a record of judgment for his costs; but this cannot be the true construction, for the plaintiff has an unquestionable right to make up the record for the amount of his recovery, and should he do so, and the defendant also make up a record, there would be two records of judgment in one cause, which is not in harmony with the orderly conduct of legal proceedings. Whatever may have been the practice heretofore, the correct course is for the plaintiff to make up the record of judgment, the defendant to procure his costs to be taxed, and to require the plaintiff to insert them in the record, or, if the record be already made up and filed, to enter a suggestion on it stating the taxation of the costs and the amount thereof. No inconvenience can result from this practice; for if the plaintiff should neglect to make up and file the record, the court would give leave to the defendant to do it, as in cases where he wishes to bring error, and the plaintiff neglects to file the record.

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FIELD and SMYTH vs. GOODMAN.

Matter of defence arising after issue joined, intermediate the term and the circuit, must be plead at the circuit. A plea *puis darrien* under such circumstances, cannot be served in vacation.

MOTION to set aside an inquest. The issue in this cause was joined on the *sixth* day of August. On the *eleventh*, notice of trial was given for the Albany circuit, to be holden on the first Tuesday (*first day*) of September. On the *thirty first* day of August, a plea *puis darrein continuance*, setting forth a release executed by Field, one of the plaintiffs, on the *twenty-sixth* day of August, was served on the agent of the plaintiffs' attorneys at Utica, they residing at Albany. On the seventh day of September, no plea of *puis darrien* having been filed with the clerk of the circuit, an inquest was taken.

A. R. Tiffany, for defendant.

King & Denniston, for plaintiffs.

By the Court, MARCY, J. The matter of defence arising after issue joined, intermediate the term and the circuit, ought to have been plead at the circuit; and for this there is a good reason, as it is discretionary with the judge whether he will accept the plea of *puis darrien* or not. It was irregular, therefore, to serve the plea in vacation. As, however, the party swears to merits, the inquest will be set aside, on payment of costs.

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WILSON and another vs. TIFFANY.

It is irregular to serve a copy of an affidavit on which a motion is to be founded, previous to its being sworn to.

SERVICE of papers on motions. In this case, notice of a motion for a commission to examine witnesses was given. From the jurat to the affidavits produced to the court, it appeared that it was sworn to subsequent to the time of service of what purported to be a copy on the opposite party. This was objected to as irregular, and so held by the court, who said that though, under the circumstances of this case, they

would grant the motion, such objection, in any case subsequently arising, would be sustained.\*

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*Hatch & Cambreling*, for the motion.

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*J. R. Van Duzer*, contra.

\* A case subsequently came before the court, in which the same question arose, and they refused to entertain the motion.

### WILLIAMS vs. KING.

**TAXATION of costs.** In this case a question arose, whether a charge of sixty two and a half cents paid a commissioner for an order to stay proceedings, was taxable.

No fee whatever is allowed to a commissioner for an order staying proceedings.

*By the Court, MARCY, J.* It has been supposed that the prohibition of the payment of fees to an officer for granting orders to stay proceedings, under the act of 1823, (Statutes, vol. 6, p. 426 b,) extended only to orders staying proceedings on cases made after trials at the circuit. We see no reason for thus limiting the operation of the statute; its terms include, and its intent evidently was, to embrace all orders staying proceedings.

### PLATT vs. WALWORTH.

**TAXATION of costs.** The taxing officer allowed in this case a charge for engrossing a notice of special matter subjoined to the defendant's plea containing 245 fol. on the *nisi prius* roll; and a like charge for engrossing the same notice on the judgment roll. This was objected to, on an appeal from taxation.

A plaintiff is entitled to charge for engrossing on the *nisi prius* roll a notice of special matter subjoined to the defendant's plea; but not for engrossing the same on the judgment roll.

*By the Court, MARCY, J.* The notice was properly engrossed on the *nisi prius* roll, and the plaintiff is entitled to charge it in his bill of costs. But there was no necessity for

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engrossing it on the judgment roll, and for that there should not be an allowance. It is said it may be important it should be engrossed on the judgment roll, to shew the pertinency of exceptions taken at the circuit to the admission or rejection of testimony. For this purpose, it may be necessary it should be spread out in the bill of exceptions, but it need not appear on the record of judgment. What is said on this subject in 4 Cowen, 546, applies more properly to the *nisi prius* roll than to the judgment record.

McGREGOR and others vs. CLEVELAND and others.

Where a party excepts at the circuit, if the bill of exceptions is not sealed at the trial, he must prepare his bill and serve a copy within two days after the trial on the opposite party, who has four days to propose amendments, &c., as in the settlement of cases.

PRACTICE as to settlement of bill of exceptions. This cause was tried at the Washington circuit on 10th June last. Exceptions were taken by the defendants to decisions of the judge in the progress of the trial, and after the testimony was closed on both sides, the counsel excepting, in the presence of the opposite counsel, stated and repeated his exceptions to the judge who noted the same. A few days after the circuit, the defendants' attorney drew up a bill of exceptions in form, and handed the same to the judge; and on the 16th July, informed the plaintiffs' attorney that the bill had been given to the judge to correct by his minutes, and then to sign and seal it; at the same time asking the plaintiffs' attorney if he wished notice in writing of the proceedings, who answered that he did not. On the 24th July, the bill was received by the defendants' attorney, duly sealed, and on the 30th of the same month he informed the plaintiffs' attorney of the same; who then served him with a notice of taxation of costs, and on the first day of the last August term filed the postea and entered rule for judgment nisi; and on the 14th August, the judgment having been signed and roll filed, issued an execution which was levied on the property of the defendants. Previous to this, to wit, on the first day of term, a copy of the bill of exceptions, as sealed by the judge, was served on the plaintiffs' attorney.

On this state of facts cross motions were made by the parties ; by the defendants to set aside the judgment and execution ; by the plaintiffs to set aside the bill of exceptions, both as for irregularity.

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I. Williams, for plaintiffs.

S. Stevens, for defendants.

By the Court, SAVAGE, Ch. J. There is no established rule as to the settlement of bills of exceptions. In this case the points upon which the questions arose were stated at the circuit and noted by the judge, but the opposite party was not served with a copy of the bill previous to its being sealed, nor had he notice of the time and place of its settlement. This we have repeatedly intimated as necessary, to give the opposite party the opportunity of proposing amendments ; (3 Cowen, 33 ; 7 Cowen, 102 ; id. 107 ;) although the question has not been distinctly presented until now. It may therefore well be doubted whether the bill of exceptions was regularly obtained ; yet as both parties have acted in good faith, and as the practice perhaps cannot be considered as settled, we think this a fit occasion to say what should be the practice in such cases, while at the same time we secure to each of these parties the fruits of the diligence, by making such a disposition of the motions as that the plaintiffs shall not loose the lien they have obtained by the judgment and execution, nor the defendants the benefit of their exceptions. In cases where exceptions are taken at the circuit, if the bill be not sealed at the trial, the same practice should prevail in the settlement of the same as is provided by the general rules of the court for the making and settlement of cases. The party excepting should prepare his bill of exceptions, and within two days after the trial serve a copy thereof on the opposing party, who, within four days thereafter should propose his amendments thereto, and serve a copy on the party who prepared the bill of exceptions, and then such further proceedings may be had as are had in the settlement of cases. The bill from the time of its delivery, with the

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amendments, to the judge for settlement, will operate as a stay of proceedings.

In the present case we order that the judgment and execution remain, but that all proceedings thereon be stayed until, &c., and that the bill of exceptions be referred to the circuit judge to be settled, on a notice of eight days to be given by the defendants, to the end that it may be argued or otherwise disposed of.

THE PEOPLE VS. SIMEON B. JEWETT.

A challenge to the array will not be allowed on the ground that in the selection of grand jurors, all persons belonging to a particular fraternity or association were excluded, if those who are returned are unexceptionable and possess the qualifications required by statute.

It is good cause of exception to a grand juror that he has formed and expressed an opinion as to the guilt of a party whose case probably

MOTION to quash indictment. At the general sessions holden in Monroe in March, 1829, the defendant and one Burrage Smith were indicted for having with others conspired, without any legal authority or justifiable cause, to carry off and transport one William Morgan to some place unknown; and that in pursuance and prosecution of such conspiracy, they confined him in a carriage and furnished means for his abduction. The grand jury came into court on the 27th day of March; the foreman, in the presence of the jury, presented the bill of indictment, which was received by the clerk of the court, marked filed as of the day it was presented and handed by him to the district attorney of the county. At the request of the public prosecutor that no entry should be made in the minutes of the court of the presentment of the bill of indictment until the defendant should be arrested, no such entry was made during the sitting of the court, nor was it made until the month of August. On the 6th April, the defendant entered into a recognizance to answer to the indictment. In June a court of general sessions was holden in Monroe, and another on the first Mon-

will be presented to the consideration of the grand inquest; so also a grand juror's having evinced feelings of hostility towards such party is good cause of exception. But these exceptions must be taken before the indictment is found, and will not afterwards be heard.

A certiorari to remove an indictment, directed to the oyer and terminer, will not be quashed, because, at the time of the allowance of the writ, the indictment is in the sessions, if when the writ be served the indictment be in the oyer and terminer.

day of October instant, when the defendant applied to the general sessions that the entry made in the minutes of March term be stricken out; which application was denied. The common pleas and general sessions of Monroe in March were held at the same time by the same judges. The defendant is an attorney of the common pleas, and was present at the empanelling and swearing of the grand jury, who found the bill of indictment against him.

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The bill of indictment, as found by the grand jury, contained no *caption*. During the continuance of the court of sessions in March, an order was entered for the transmission of the bill of indictment to the next court of oyer and terminer to be holden in the county of Monroe. In the month of August, the deputy clerk of the sessions annexed a caption to the bill of indictment, stating that the same had been found and presented at the general sessions holden in March preceding, naming the judges who presided in the court, and the grand jurors who had found the same. On the 31st day of August, being the first day of the oyer and terminer in Monroe, the bill of indictment was filed in that court. On the 2d day of September a *certiorari* was presented, removing the same into this court, which was allowed by the chief justice on the 3d day of August. It is directed to the judges of the oyer and terminer and jail delivery of Monroe, returnable on the first day of this term.

In addition, the defendant presented the following facts by affidavits: 1. That the defendant had been informed, (which information he believed to be true,) by a person who had been supervisor of the town of Mendon in the county of Monroe for the years 1827 and 1828, that the *anti-masonic* supervisors of the several towns in the county, or a part of them, in preparing the lists of grand jurors for the county for those years, intentionally and purposely left off and omitted to put on to the said lists competent and qualified men for grand jurors, for no other reason than that they were members of the masonic fraternity; and that they selected those who were most zealous anti-masons; 2. That a pamphlet had been published by a committee of whom Isaac Lacey, the *foreman* of the grand jury who had presented the

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bill of indictment against the defendant was one; that the title of the pamphlet is "A narrative of the facts and circumstances relating to the kidnapping and presumed murder of William Morgan;" that to it are appended remarks of the committee, in which, after stating amongst other circumstances that two persons, naming the defendant as one of them, on being called as witnesses before the grand jury of Monroe refused to testify, because, as they alleged, they could not do so truly without criminating themselves, they conclude as follows: "Whether all who were concerned in his kidnapping have been accessaries or consented to his death, we undertake not to decide. But whatever were the original designs or motives of those who were concerned in his disappearance, all of them who have not fully, frankly and promptly explained the part they are known to have performed, have, we think, no right to complain if their fellow-citizens in general regard them as accessaries to the murder of William Morgan, and shall hereafter treat them accordingly." 3. That Benjamin Wood, one other of the grand jurors, had, before the finding of the bill of indictment, in repeated conversations declared that the defendant was concerned in the abduction of Morgan; aided in carrying him off; was guilty thereof; and ought to be punished therefor. And that in such conversations Wood discovered great malignity of feeling and bitter hostility against the defendant.

On this state of facts the defendant moved to quash the indictment.

M. T. Reynolds, J. A. Spencer, and E. Griffin, counsel for the defendant.

D. Cady, for the people.

For the defendant, it was insisted that a bill of indictment without a caption is bad, (1 Chitty's C. L. 327, 384;) that the bill in this case should be considered as without a caption, the clerk not being authorized to prefix the caption because not warranted by the records of the court. There was no entry in the minutes of the court stating the finding of the bill, except what had been made in the recess of the

court; the court itself at a subsequent session could not have altered or changed the minutes of the proceedings of a previous term, much less had the clerk a right to do so. Besides, after the allowance of the certiorari, all subsequent proceedings are erroneous, (1 Chitty's Crim. Law, 390. 1 Salk. 148.)

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The grand jury were improperly selected by the supervisors. An erroneous principle of exclusion is as objectionable as a vicious selection. None are to be excluded but those who are not possessed of the necessary property qualification to serve as petit jurors; who are not of approved integrity; who are not of fair character; who are not of sound judgment, and who are not well informed. (Statutes, vol. 8, 312, a.) Instead of taking the statute for their guide, the supervisors selected the grand jurors with a direct reference to the subject on which the public mind was exasperated, and the effect of the exclusion of masons was the same as an improper selection for an undue purpose.

The foreman of the grand jury and the other juror having formed and expressed opinions as to the guilt of the defendant previous to their being empanelled, were not competent to find a bill against him. By the common law, grand jurors are to be "good and lawful men," that is, men free from all objections, and such as might serve upon a petit jury. If improper persons are returned, it is the practice of the courts to reform the panels, as well of grand inquests as of a petit jury. (1 Chitty's Crim. Law, 307. Hawkins, book 2, ch. 25, § 18, 28, 33. Bacon's Abridg. tit. Juries A.) The provision in the Revised Statutes, (2 R. S. 724, § 27, 28,) limiting the challenge to special cases before the jury are sworn, recognizes the law as existing, for which the defendant contends. A party recognized or in jail, must challenge the juror when he comes to be sworn, but one who has no day in court is put to his plea in avoidance or motion to quash. The latter is the universal practice in our courts.

For the People. The certiorari was misdirected. It was allowed on the *third* of August, and directed to the oyer and terminer, when in fact, the indictment was in the sessions

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till the *thirty-first* day of August. It never was legally in the oyer and terminer, and therefore must be considered as remaining in the sessions. (2 R. L. 150.) If this be correct, then, instead of the indictment the certiorari should be quashed

A caption to the indictment was not necessary in the sessions. It became necessary only in consequence of its removal, to shew that it was found in a court of competent jurisdiction. The bill of indictment was a record of the court, it became such when filed, the same as any other paper which is filed, and this authorized the affixing of the captior. The entry in the minutes of the bringing in of the bill does not add to its validity; there is therefore no necessity for it. A good reason is given in this case why the entry was not made, and why it should not be required. Besides, the objection comes too late. Two courts of sessions have been held since the bill was found, and the defendant arrested. He should have applied before. The delay so highly beneficial to him, should he now succeed, is a sufficient answer to the motion.

The first objection urged is to the *array*. This should have been made when the jurors were empaneled. The defendant was present in court, and though not under recognizance, if apprised of partiality, or of gross improper conduct in the selection of the jurors, he should have made the objection; even as *amicus curiæ*, he might have informed the court. But what is there in the objection that *free-masons* were excluded from the pannel? There is no law requiring a certain number of masons to be empaneled; and if the supervisors, in the exercise of a sound discretion, under the peculiar circumstances of the case, thought fit not to return them as grand jurors, who shall say they erred; that their discretion was not properly exercised? At all events, how is the defendant injured by the exclusion? He does not shew himself a mason.

The objection to the individual jurors is equally untenable. *Lacey* states a fact in relation to the defendant which is not denied, and submits his conclusions to the public. *Wood* says the defendant is guilty. If he speaks from knowledge, and not from prejudice, this is no cause of chal-

lenge. But these objections cannot be sustained. The right to challenge has grown up under the statutes, 11th Henry 4, and 3d Henry 8; the one avoiding indictments by out-laws, felons and traitors; and the other authorizing the justices to reform juries. (Bacon's Abr. tit. Juries, A.) We have no such statutes; and the revised laws, instead of recognizing, condemn the principle of those acts. Public policy and the due administration of justice forbid that challenges of this nature should be allowed, especially after indictments found. (9 Mass. Rep. 107.)

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In reply, it was said that the direction of the certiorari to the oyer and terminer was no cause for quashing it. Had a return been made that the indictment was not in the court, the writ might have been nugatory: but it having brought up the indictment, was a very convincing proof that it was not nugatory, and had not been misdirected.

The following opinions were delivered by the court:

SAVAGE, Ch. J. It is proper, in the first place, to dispose of the motion to quash the certiorari. This was urged on the ground of its being directed to the oyer and terminer instead of the general sessions of Monroe. When the certiorari was allowed, the indictment was in the sessions; when it was served, it was in the oyer and terminer, in pursuance of an order previously made by the sessions. Being there, the certiorari operated upon it, and produced the result intended by it, to wit, the removal of the indictment into this court. There is therefore no reason for quashing the writ.

Whilst the indictment remained in the court of sessions, a caption to it was not necessary. Where a certiorari is sued out to remove an indictment into another court, a caption must be affixed to shew the regularity of the finding of the bill. It is the duty of the clerk to affix it, and he is warranted in so doing, whether an entry is or is not made in the minutes of the court of the finding of the bill. If, in truth, a bill was found by a grand jury, brought into court, filed and made a record of the court, it is enough to justify him. An entry was in fact made in this case, and approved by the

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court of sessions, though made after the closing of the term at which the bill was found. We are not called upon to say whether an entry is necessary ; but if necessary, the due administration of justice may require that it should not be made until after the person accused has been arrested. In this case it was omitted, at the instance of the public prosecutor, for the very purpose of preventing publicity being given to the transaction, until the defendant should be arrested. If this is a matter resting in discretion, (and we think it is,) all pretext for the charge of irregularity is destroyed.

By the act directing the mode of selecting grand jurors, passed in 1827, (Statutes, vol. 8, p. 312 a,) the duty of making the selection is conferred upon the supervisors of the several counties of the state. They are required to select such men only as they shall know, or have good reason to believe, to be possessed of the necessary property qualification to sit as petit jurors ; to be men of approved integrity, of fair character, of sound judgment, and well informed. Thus, the qualifications of the grand jurors are defined by statute, and if those selected possess the required qualifications, there can be no objection to the array. I do not approve of the exclusion by the supervisors of any set of men, on the ground of their belonging to any particular association or fraternity. A grand jury should be selected with a single eye to the qualifications pointed out by the statute, without enquiry whether the individuals selected do or do not belong to any particular society, sect or denomination, social, benevolent, political or religious. It is represented to us that one of the supervisors of Monroe had stated that the anti-masonic supervisors of that country, or a part of them, in preparing the lists of the grand jurors, had, on the one hand, intentionally and purposely left off the names of individuals for no other reason than that they were members of the masonic fraternity ; and on the other, that they had selected those who were most zealous anti-masons. If a part of the supervisors erred in the discharge of their duty, it is not to be presumed that a majority of them, upon whom the task devolves finally to determine the persons to be selected, fell into the same error. But if they did thus err, the array cannot for that cause be

challenged. Whilst those who are selected are unexceptionable, the fact that others equally unexceptionable are excluded is no cause of challenge of the array. A challenge can be supported only by shewing that the persons selected are not qualified according to the requirements of the statute.

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As to the right of challenge to the polls. The objection urged against Lacey, the foreman of the jury, is that he, with others, published a pamphlet, in which it is stated that the defendant, when called upon as a witness in reference to the abduction of Morgan, had refused to testify, alleging that he could not do so truly without criminating himself; and concludes with strictures on the conduct of the defendant, shewing the estimation in which the juror held the defendant on the subject of the charge against him. It is not perceived how this could disqualify the juror from serving on the inquest, or finding a bill against the defendant. The fact stated by the juror is not denied by the defendant, nor is it intimated that the charge was made from prejudice or hostility. As to Wood, the other juror, good cause of challenge existed. There are causes of challenge to grand jurors, and these may be urged by those accused, whether in prison or out on recognizance; and it is even said that a person wholly disinterested may, as *amicus curiæ*, suggest that a grand juror is disqualified. But such objection, to be availing, must be made previous to the juror being empannelled and sworn. It has been urged upon us that the defendant not having been apprised of any intended proceeding against him, not having been arrested on a criminal charge, or required to enter into recognizance to appear at the court where the bill of indictment was found, had not an opportunity to make his challenge; that now is his earliest day in court, and that he ought therefore to be permitted to avail himself of this defence. Although the force of this appeal is felt, I cannot yield to it, and consent that after an indictment found the party charged may urge an objection of this kind in avoidance of the indictment. The books are silent on the subject of such exception after indictment found, and in the absence of authority, I am inclined to say, in consideration of the inconvenience and delay which would unavoidably ensue in the

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administration of criminal justice, was a challenge to a grand juror permitted to be made after he has sworn and empannelled, that the objection comes too late. I am therefore of opinion that on neither of the grounds urged by the defendant ought this motion to be granted.

MARCY, J. I fully concur in the views taken by the chief justice in this case, and it is useless perhaps for me to enlarge upon them. In relation, however, to one or two points embraced in this motion, I will add a few remarks.

The caption is no part of an indictment. It is said to be only the style of the court in which the indictment is found. While the indictment remains in that court, it is not necessary, and I believe not usual, to add the caption; but when it is removed by a writ of *certiorari* or otherwise, the caption is added by the clerk. It is a mere ministerial act of that officer. I do not discover that it was not properly done in this case.

The alleged misconduct of the supervisors of Monroe county, in selecting the grand jurors, if shewn in a more satisfactory manner than it is in this case, would not authorize us to sustain the motion on that ground. One of that body avowed, that in executing the duties of the act of 1827, he excluded from his choice all free masons and that some others did the same. I am free to say, that the setting up a rule of exclusion, not warranted by the statute, was improper and reprehensible, and if corruptly done, constituted an offence; and even if done under a mistaken notion of duty, it can receive no countenance from us.

After diligent search, I do not find that an objection to an indictment has been sustained where the jurors were *probi et legales homines*. Although some of the supervisors acted upon a rule that excluded individuals who had all the qualifications required by statute, this did not operate to bring in any person who had not those qualifications. The law does not require all the qualified persons in the county to be selected. The supervisors selected the full number, and those they selected were competent. Notwithstanding all the members of a particular association were excluded, it does not appear that the supervisors returned one man who had not the requi-

site property qualification, who was not of approved integrity, sound judgment and well informed. I admit that it was properly urged on behalf of the motion, that the being a free mason was no disqualification, but it is no less true, that being an anti-mason is not a disqualification. The jurors returned by the supervisors were therefore legal jurors, and the indictment found by the jury cannot be quashed on the ground of its being the act of improper indictors.

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I have had more difficulty in disposing of the objection made to Lacey and Wood. What is urged against Wood particularly, would have been sufficient to exclude him on a challenge upon the ground of favor; though on the argument, it was said to be otherwise by the counsel for the people. The opinion of Ch. J. Marshall on the trial of Col. Burr,, and of Woodworth J. in the case of *The People v. Barker*, are decisive of this question. If the objection to these jurors could have been presented when they were empannelled, and the facts on which it rests properly authenticated, I think it would have been sufficient to exclude them.

As the defendant was not recognized to appear at the sessions when the indictment was found, he did not know that any charge would be laid before the grand jury against him, and consequently he had no opportunity to object to these jurors before they were sworn and had presented their indictment. He had not done or omitted to do any act whereby his rights are compromised; but it does not thence follow that he can have this indictment quashed, because, at a previous stage of the prosecution, he would have had a right to remove one of the jurors from the panel. Though I feel the force of the argument, that the defendant should be allowed the benefit of an exception to a partial grand juror, I cannot turn my view from the consideration of the great delays and embarrassments which would attend the administration of criminal justice, if it was to be obtained in the way now proposed. No authority for adopting this course was shewn on the argument, and I have not since been able to find any. It would be a novel proceeding, and there is reason to fear it might be followed with more serious difficulties than are now foreseen.

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Among the objections, not the least, as I conceive, would be the want of a proper mode to establish the alleged disqualification of the grand jurors objected to. It could not be well done by affidavits, and to do it through the instrumentality of triors, almost necessarily in the absence of the person tried, and long after he had performed the act which it would be the object of the trior to shew his disqualification to perform, would be worse than inverting the order of things. Great caution should be used to preserve the administration of justice pure and impartial. It is not so vitally important to persons accused that grand jurors should be beyond all exception, as that petit jurors should be so, and in some instances the law makes a distinction between them; but I think it is rarely or never the case, that the finding of a petit jury, either in a civil or criminal case, has been set aside on the discovery that a juror had a pre-conceived opinion in relation to the matter passed upon, although such opinion would have constituted a valid objection to his being empannelled.

Motion denied.*

*Since the determination of this question, Mr. Justice Marcy has called the attention of the reporter to a case which arose in the supreme judicial court of Massachusetts, in 1811, respecting the *challenge to a grand juror*. On a grand juror being called to be sworn, Story, (probably now Mr. Justice Story of the United States' bench,) as *amicus curiæ*, suggested that one ——— had been accused of the crime of murder, and that his case would probably come under the consideration of the grand jury; that the juror called was a neighbor of the accused, had originated the complaint against him, and had most probably formed a strong opinion of his guilt. The court, alluding to the challenges to the grand jurors on Burr's trial in Virginia, and pronouncing that a solitary instance, observed, that if objections of this nature were to be received, the course of justice would be greatly impeded; that the knowledge of the general character of parties and witnesses by those who reside in the vicinity of persons accused, rendered them more fit to serve on grand juries. If, however, any individual juror should be sensible of such a bias upon his mind that he could not give an impartial opinion in any particular case under the discussion of the jury, such juror would feel it his duty, as it would be his right, to forbear giving an opinion, or perhaps to withdraw, while the subject was under discussion. The juror was sworn. (8 Mass. R. 286.)

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In the matter of E. WARNER and A. B. PHELPS, proceeded
against as absconding or concealed debtors.

In the matter
of Warner and
Phelps.

MOTION to set aside attachment. The attachment was issued by the recorder of New-York, on the petition of a creditor stating that the parties proceeded against were indebted to his firm in the sum of \$100 or upwards; that they had departed this state, or were concealed within it, with intent to defraud their creditors, or to avoid being arrested by ordinary process of law. The petition was verified by the oath of the petitioner, and by the affidavit of two witnesses that they verily believed that the debtors had departed the state, or were concealed within it, to defraud their creditors, or to avoid being arrested, &c.

Where the proceeding under the act for relief against absconding and absent debtors is against an absconding or concealed debtor, proof that the defendant is indebted within the state is necessarily implied in the evidence that the debtor has departed, or is concealed within the state.

The motion was made on the ground of defect of evidence, that the parties proceeded against were indebted within this state.

H. M. Western, for the motion.

S. B. H. Judah, contra.

By the Court, MARCY, J. This motion probably originated from a misconception of Fitch's case, (2 Wendell, 298.) That was a proceeding against an *absent* debtor; this is against *absconding* or concealed debtors. The proof of indebtedness within the state, to authorize the issuing of the attachment, is necessarily implied in the evidence that the defendant has *departed* the state, or is *concealed* within it. If concealed within the state, his residence is here; and if departed from the state, his residence must have been here previous to such departure. Previous to his concealment or departure, he must have been a resident; and if so, being here, he was indebted within this state. The motion, therefore, is denied.

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AIKINS vs. COLTON.

Where money is paid into court after issue joined, and the plaintiff proceeds in the suit, but fails to establish his demand beyond the amount paid in, the defendant is entitled to the costs of the defence incurred subsequent to the payment of the money into court, but not to the costs previously accrued.

MOTION for re-taxation. The defendant after issue joined paid a certain sum into court in satisfaction of the plaintiff's demand and of the costs then accrued. The plaintiff took the money, and proceeded in his suit. On the trial of the cause, after the evidence was closed on both sides, the plaintiff submitted to a nonsuit. The defendant consequently became entitled to costs. In making up his bill, he charged the costs incurred in the defence previous to the payment of the money into court, which the taxing officer refused to allow; and he now appealed from the taxation.

E. C. Southerland, for defendant.

Clinton & Hasbrouck, for plaintiff.

By the Court, SAVAGE, Ch. J. The taxing officer properly rejected those charges. The payment of the money into court was an admission of the plaintiff's demand to that amount. The plaintiff, therefore, had a good cause of action until the payment of the money, and until then the defendant had no defence. The defendant is entitled only to the costs incurred in the defence subsequent to the payment of the money into court. (2 Barnes, 230. 1 T. R. 629. id 710. 8 T. R. 408.) The motion, therefore, is denied.

GRISWOLD vs. SEDGWICK and others.

In an action of false imprisonment against four defend-

ants, where one of them is, on the trial of the cause, acquitted by verdict, he is entitled to recover costs against the plaintiff, although he joined in pleading with one of the other defendants against whom a verdict is rendered.

So judgment having been rendered on demurrer in favor of the defendant who was acquitted at the trial, and of another against whom a verdict was found on the plea of not guilty, the plea put in by them going to the whole declaration having been adjudged good; it was held that such two defendants were entitled to their full costs of the trial as well as of the demurrer; a single bill of costs, however, being allowed to both such defendants.

imprisonment. R. & H. Sedgwick pleaded jointly the general issue, and a special plea of justification. Morris and Reid put in the same pleas separately. The plaintiff replied to the special plea of the Sedgwicks, and demurred to the special pleas of Morris and Reid. The Sedgwicks demurred to the replication.

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The plaintiff took his cause down to trial before the issues in law were determined, and obtained a verdict of six cents against H. D. Sedgwick, Morris and Reid. R. Sedgwick was acquitted. On the demurrer to the pleas of Morris and Reid, judgment was given for the plaintiff; and on the demurrer to the replication, judgment was given for the Sedgwicks, and leave was refused to the plaintiff to amend. The parties proceeded to the taxation of their costs. The taxing officer decided that H. & R. Sedgwick were entitled to the costs of the demurrer decided in their favor, but not to the costs of the defence generally; that R. Sedgwick was not entitled to the costs of his pleas and of the trial; and that the plaintiff was entitled to his full costs on the issues, and on the demurrers decided in his favor against the *three* defendants against whom the verdict was rendered; and taxed the costs in conformity to those decisions. Judgment was signed against those three defendants for the costs thus taxed. A motion was made to set aside the judgment for costs against H. D. Sedgwick, and for a retaxation of the costs.

R. Sedgwick, for defendants.

G. D. Post, for plaintiff.

By the Court, MARCY, J. It is necessary to the correct determination to the question of costs in this case, first to ascertain the effect of the judgment in favor of H. D. & R. Sedgwick, on the demurrer to the plaintiff's replication in answer to the special plea of justification put in by them. By the judgment, the plea of justification was adjudged good, and the court will not look beyond the record to inquire whether the demurrer was sustained on a technical ground, or on the merits. It is an established principle, that where a defendant pleads several pleas in bar, each going to the

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whole declaration, if he succeeds upon any one plea he has judgment, although the plaintiff may succeed on the other pleas. The judgment on the demurreer, therefore, was equivalent to a finding of the jury in favor of both the Sedgwicks on an issue joined on this plea. Consequently the judgment entered against H. D. Sedgwick was irregular, and must be set aside.

The costs of the demurrer are allowed to the Sedgwick's by the taxing officer, and they now ask to be also allowed the costs of the trial. One of them, Robert Sedgwick, was acquitted by the jury; the other, Henry D. Sedgwick, having succeeded on a plea adjudged to be good on demurrer, must also be considered as acquitted, notwithstanding that on another plea he was found guilty on the trial. The question therefore is whether a plaintiff, who has succeeded in obtaining a verdict against two, out of four defendants, is liable to pay costs to the defendants who are acquitted. By the second section of our act concerning costs, (1 R. L. 343,) it is provided that if a verdict pass *against a plaintiff*, the defendant shall have judgment to recover his costs. This section embraces the substance of a number of English statutes, passed previous to the reign of William III., the construction of which has been, that unless *all* the defendants impleaded in an action are acquitted, the plaintiff is not liable to pay costs to any; but is entitled to recover his full costs against those who are convicted. This construction applies to the second section of our act. To remedy the hardship and injustice resulting from the construction of the statutes referred to, the act of 8 & 9 William III. c. 11, was passed, of which the *tenth* section of our act is a transcript; which provides that where several persons are made defendants to any action of trespass, assault, false imprisonment, or ejectment, and *any one* or more of them shall be upon the trial thereof acquitted by verdict, every person so acquitted shall recover his costs of suit in like manner as if a verdict of acquittal had been given in favor of *all* the defendants, unless the judge shall certify, &c. It is contended by the plaintiff that this section applies only where an acquitted defendant has plead *separately*; and that Robert Sedgwick having join-

ed in the plea of not guilty, with Henry D. Sedgwick, and the latter having been found guilty by the jury, the former looses the benefit of this section. We find no case supporting such a distinction, and consider it in conflict with both the spirit and terms of the act. Robert Sedgwick therefore having upon the trial been acquitted by verdict, and he and Henry D Sedgwick having succeeded upon a plea adjudged good by demurrer, which, as before observed, is equivalent to a finding by a jury in their favor upon an issue joined, they are entitled to their full costs; a single bill of costs however, for both defendants, is only to be taxed.

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v.
Miller.

PORTER and others vs. MILLER.

MOTION for judgment *non obstante veredicto*. The action was assumpsit. The defendant pleaded the general issue and an *insolvent discharge*, exempting his body from imprisonment. It was averred in the special plea, that on &c. at Lenox, in the county of Madison, the defendant being then *of the said county of Madison*, and being then and there an insolvent debtor, within the true intent and meaning of the act, &c. did present a petition to a judge of the court of common pleas of the county of Madison, &c. and that such proceedings were thereupon had, that afterwards the said judge granted a discharge, setting forth the same *in hæc verba*. In the discharge it is recited, that the defendant, "of the town of Lenox, in the county of Madison," did present his petition, &c. The plaintiffs replied, denying the granting of the discharge. The cause went to trial, the plaintiffs had a verdict on the first issue for the amount of their demand, and the jury found for the defendant on the second issue. A motion was now made for leave to enter a general judgment against the defendant, notwithstanding the verdict.

An averment in a plea of an insolvent discharge, that the defendant was "of the county" to a judge of which he presented his petition for a discharge, is sufficient to give the judge jurisdiction.

W. J. Bacon, for plaintiffs. The plea is defective in not averring that the defendant, at the time of the presenting of his petition, was *an inhabitant of the county of Madison* or

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that he was imprisoned within the same. (Statutes, 5 vol. a. 117. 1 R. L. 463. 1 Cowen, 316. 20 Johns. R. 208. 1 id. 91. 7 id. 75.) The plea is bad in substance, and would so have been held on general demurrer, which entitles the plaintiffs to move for judgment *non obstante*. (16 Johns. R. 230. 18 id. 20. 1 Burr 301.

J. A. Spencer, for defendant. The plea *substantially* avers that the defendant was an inhabitant of the county of Madison. The plaintiffs might have taken issue upon this fact, and the defect, if any, could have been taken advantage of only by special demurrer. Should the court, however, think otherwise, the defendant asks that he may be allowed to amend on payment of the costs of the circuit, should the plaintiffs elect to take issue on the question of inhabitancy.

By the Court, SAVAGE. Ch. J. The principle contended for by the plaintiff, that if the plea of discharge would have been subject to a general demurrer, the plaintiff may move for judgment, notwithstanding a verdict in favor of the defendant, is correct; but it does not avail the plaintiffs in this case. The defendant was undoubtedly bound to aver enough to give the officer who granted the discharge jurisdiction. This we think he did, when he alleged that he was "of the county of Madison." It was equivalent to saying, that he was *an inhabitant* of that county. The words that he was "of the county," necessarily import that he was an inhabitant of the county or resident there. The very words employed in the statute need not be used, as was determined in the case of *Roosevelt v. Kellogg*, (20 Johns. R. 208,) where it was holden that an averment that the defendant was "a resident of the city of Hudson, in the county of Columbia," was sufficient to give jurisdiction to the recorder of Hudson. Temporarily being in a place would not support the allegation that the defendant was *of the county*, which words import that he belonged to the county or resided there. In *Wyman v. Mitchell*, (1 Cowen, 316,) an averment that the defendant was an insolvent debtor "at Rensselaerville, in the county of Albany," was held insufficient; but that case is

clearly distinguishable from the present. The averment that the defendant was an insolvent debtor at Rensselaerville, might be true, and yet his residence or inhabitancy be elsewhere. The motion in this case is therefore denied.

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Story
v.
Patten.

THE PEOPLE, on the relation of Ransom, vs. ONONDAGA C. P.

MOTION for a mandamus. A judgment was obtained in the Onondaga common pleas against the relator for \$1000 in an action of *tort*. The plaintiff issued an execution setting forth the judgment correctly, but directing the levy of only \$800. The amount directed to be levied was collected, and then the plaintiff issued a second execution directing the levy of the remaining \$200; to set aside which execution, a motion was made to the Onondaga C. P., who refused the application. A mandamus was now asked for, directing the C. P. to vacate their rule denying the motion, and to grant the application of the relator.

A plaintiff issuing an execution, and directing an amount less than the whole sum to which he is entitled to be levied, cannot subsequently issue another execution for the balance.

By the Court, SAVAGE, Ch. J. An execution is an entire thing. If a plaintiff in a judgment issues an execution, and directs an amount less than the whole sum to which he is entitled to be levied, he cannot subsequently issue another execution for the balance. It cannot be permitted that a defendant should thus be harassed by repeated executions. The common pleas erred in denying the motion of the relator, wherefore, let an alternative mandamus issue.

A. STORY vs. PATTEN.

MOTION to set off justices' judgments against a judgment in this court. A judgment was rendered in favor of the defendant in this court against whom a judgment is rendered will not, on motion, be allowed to set off a justice's judgment holden by him as assignee, where the facts as to the rights of the parties are complicated and intricate. *It seems* that unless a plain, undisputed matter of set-off is presented by a party thus standing in the character of an assignee of a justice's judgment, the motion will be denied.

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plaintiff in this court for \$94,68. A motion was made by the defendant to set off three justices' judgments, (or as much thereof as should be necessary,) amounting together to \$114,55, rendered against the plaintiff in favor of one Howland, and assigned by him to the defendant previous to the rendition of the judgment in this cause. This motion was resisted upon various grounds, and amongst others that A. Story was but a *nominal* plaintiff, the real plaintiff being one W. Story, for whose benefit the suit had been prosecuted; and that the defendant in the prosecution of this motion, acts only as the agent of Howland the assignor of the justices' judgments, having no real interest in the judgments. To this, it was answered that the interest of W. Story in the judgment claimed by him was fraudulent, and the court were asked if they entertained doubts on the question to award a feigned issue.

Kellogg & Sandford, for the motion.

F. G. Jewett, contra.

By the Court, MARCY, J. In 8 Cowen, 126, a motion was granted to set off a justice's judgment against a judgment of this court. The judgments were between the same parties; there was no conflict as to the rights of assignees of choses in action; no allegations of fraud in relation to those rights. It was a plain undisputed matter of set off, and the only question was whether the principle by which the set off of judgments in courts of record against a judgment of this court is allowed, should be extended to justices' judgments. This is a very different case; the moving party here is an *assignee* of the judgments he asks to set off; it is alleged that other persons than the parties on record are contesting their rights before us; the rights themselves are denied; fraud is alleged, and a complicated intricate state of facts is presented, so that even the party who asks our interference suggests the possibility of the necessity of a feigned issue.

Now, although the court will not say that they would not, in any case, on a motion to set off a justice's judgment, protect the rights of an assignee, they have no hesitation in dis-

missing this application, as they feel no disposition to extend their jurisdiction, in the exercise of their equitable powers, to investigate the rights of parties respecting justices' judgments, when involved in the intricacy, doubt an uncertainty which belongs to this case. The motion, therefore, is denied with costs.

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Ross
v.
Mayor, &c. of
New-York.

Ross and others vs. THE MAYOR, ALDERMEN, &c. of
New-York.

THE corporation of New-York, by an ordinance passed the 5th May, 1828, ordained "that a bulk-head be built in and across the slip or basin at the foot of Spring-street, on the westerly line of West-street; and that the space between the present bulk-head and the one to be built, be filled in under such directions as shall be given by the street commissioner and one of the city surveyors," and appointed assessors to make an estimate of the expense, and to make a just and equitable assessment thereof, among the owners or occupants of all the houses and lots intended to be benefitted thereby, in proportion as nearly as might be to the advantages which each should be deemed to acquire. An assessment was made, which was apportioned amongst the owners of lots on Spring-street, as far east as Clark-street, and amongst the owners of lots on the streets intersecting Spring-street, half way to the next street north and south of Spring-street, except that a certain tract of ground lying between Spring and Canal-streets and West and Washington-streets, was not subjected to assessments for any portion of the expense; and it was alleged that a lot belonging to one George Watkins, lying upon West-street at the north corner of Spring-street, had not been subjected to an apportionment of such expense; nor was any portion of such expense assessed upon Canal-street, although it heads partially upon the slip at the foot of Spring-street. The facts appeared in a return to a *certiorari*, made by the mayor, &c. of the city of New-York.

Under an ordinance of the corporation of New-York, directing the filling up, altering or amending a public slip, the assessment should be made under the 269th section of the act relative to that city; and property in the vicinity belonging to the corporation is equally liable to assessment as the property of individuals, notwithstanding that the statute directs that one third of the expense of the improvement shall be borne by the corporation.

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D. Lord, junior, for relators. The principle upon which the assessment is made is erroneous. It is made on the assumption that the improvement was directed by the common council, in pursuance of the authority vested in them by the 267th section of the act relative to the city of New-York, (Statutes, vol. 2, p. 445,) which authorizes the common council to pass ordinances "for filling up, altering and amending of all public slips in the city." The authority conferred by this section is for the promotion of the public health of the city; and the expense of filling up, altering or amending a slip is to be borne, one third thereof by the common council, and the residue by the persons in the vicinity who may be benefitted thereby, (§ 269.) Admitting the work to be of the character authorized by the 267th section, the assessment ought to have extended to Canal-street, and not been confined to Spring-street; nor ought the tract between Spring and Canal streets (on which a public market is erected, belonging to the corporation,) to have been exempted. Indeed it should have borne the whole expense.

The work should be considered as done under the 220th section of the act which authorizes the common council to lay out regular streets or wharves, and from time to time to lengthen and extend the same. The ordinance virtually *extended West-street*, and the expense ought to have been borne solely by the proprietors of land adjoining or nearest and opposite to the street or wharf, in proportion to the breadth of their several lots, (§ 221.)

R. Emmet, for the corporation. The proceeding in this case was under the 267th and 269th sections of the act. The work was the "filling up, altering and amending a public slip." The primary object was the improvement of the slip, and though the extension of West-street was the result of the work, such extension was but a consequence, and not the object originally contemplated. The proceedings therefore should not have been under the 220th and 221st sections.

It is not pretended that *one third* of the expense had not been paid by the corporation, but it is said that in addition thereto they should have been assessed as the owners of the

property on which the market stands. This proposition is denied. The charge of *one third* of the expense of filling up, altering or amending a slip, is imposed as a fixed ratio to be borne by the corporation, whether they hold property in the vicinity or not. It is a commutation in lieu of all other charges and assessments, and established to prevent disputes as to the extent of their liability.

The common council have a right to make an alteration in a slip, as well for the benefit of navigation as for the promotion of the public health. If not done solely for the promotion of the public health, it does not necessarily follow that *all property equally near to the slip* should be assessed. The property in Canal-street was exempted because it had its *own burdens* to bear of a similar character, to defray which the property in Spring-street contributed nothing.

By the Court. The assessment in this case was correctly made under the 269th section of the act, (2 R. L. p. 445,) but in the application of the principle the assessor erred. By this section it is directed that in all cases where the by-laws or ordinances (of the common council) shall require any thing to be done in relation to the filling up, altering, or amending any of the public slips in the city, the corporation shall cause the expense of such works to be estimated and assessed in the same manner as is directed by the act with respect to the paving or regulating the public streets in the city, except that one third of the expense attending the same is to be borne by the corporation, and the residue by the persons in the vicinity who may be benefitted thereby. The manner of estimating and assessing the expense of paving and regulating the public streets is to make "a just and equitable assessment thereof among the owners or occupants of all the houses and lots intended to be benefitted thereby, in proportion as nearly as may be to the advantage which each shall be deemed to acquire." (§ 275.) The direction given to the assessors by the ordinance of the corporation was in conformity to this provision of the statute, but the assessors did not obey it when they omitted to assess a proportion of the expense on the lot owned by the corporation, on which the

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market is built. The property of the corporation, if benefited by the improvement, is as much the subject of assessment as the property of individuals. The intention of the legislature is manifest, that the property in the vicinity shall contribute two thirds of the expense, and whether that property belongs to the corporation of the city, or any other body corporate, or to individuals, is immaterial. The charge of one third of the expense to the corporation in improvements of this kind is made by the statute, without reference to the owning of property by the corporation in the vicinity. It is a charge upon the funds of the city generally, in consequence of the general benefit derived from the improvement, and the profits accruing to the corporation from wharfage, &c. In this respect, therefore, the assessment is erroneous, and must be set aside. As to the lot lying upon West street, in the north corner of Spring street, returned as belonging to George Watkins, the relators have mistaken the fact. That lot is assessed as No. 10, fronting on West street, and therefore is properly omitted from the assessment, as fronting on Spring street; on that street it is designated in the map as No. 11, and no assessment appears in the return to have been made on it as No. 11, which probably misled the relators; but the lot having been assessed as No. 10, it would have been erroneous to have made a second assessment upon it.

END OF NON-ENUMERATED CASES OF OCTOBER TERM, 1829.*

* Mr. Justice SUTHERLAND was prevented by indisposition from attending court during the greater part of this term.

ALBANY,
October, 1829.Jackson
v.
French.

JACKSON, ex dem. HAVERLY and wife, vs. FRENCH.

THIS was an action of ejectment. The plaintiff claimed to recover the equal undivided fourth part of a lot of land situate in the county of Saratoga. Nicholas Visscher, the maternal grandfather of the wife of Haverly, was the owner of the lot in question, and by his last will and testament bearing date 30th June, 1778, devised the same to his daughter Margaret, the wife of John Wemple. Wemple and wife had four children, of whom the wife of Haverly was one. Margaret Wemple died 12 or 14 years before the trial, and John Wemple died 5 or 6 years before the trial. It was proved that the defendant had acknowledged that he had purchased the land of John Wemple. This fact was shewn by the testimony of a witness who was present, and heard such acknowledgement when the defendant was stating his case to counsel, the witness and the defendant being both in possession of the same lot, and suits having been commenced against them by the lessors of the plaintiff for the recovery of the land, they together called upon counsel, in which interview the acknowledgment was made. This evidence was objected to by the defendant, but the objection was overruled by the presiding judge.

On the part of the defendant it appeared, that Nicholas Visscher, in his life time, promised to give the lot in question to Wemple and wife; that Wemple, during the life time of Visscher, entered into the possession of, and rented out the lot. The defendant had been in possession 36 years claiming the lot as his own.

The judge at the circuit ruled that Wemple was tenant by the curtesy, and that on his death his children were entitled to the possession; that if Wemple entered into pos-

a conveyance from the husband was not adverse, and that a conveyance to the husband from the ancestor could not be presumed.

Notice to quit not necessary where there is no tenancy in fact, and especially where the defendant disclaims to hold as tenant.

The privilege of not disclosing a communication made by a client to counsel is confined to counsel and to an interpreter, though it seems the rule might perhaps be extended to the clerks of counsel.

But a person in no way connected with the counsel, present at a communication made to him by a client is bound to testify.

Where a person entered into the possession of land belonging to his father-in-law, who promised to give he land to him and his wife, and subsequently by will devised the same to the wife, it was held in an action of ejectment brought by the heirs of the wife, that a possession of 36 years continuance under

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session of the lot under the parol permission of Visscher, he was a tenant at will, and the defendant having entered under Wemple stood in the same relation, and that, under the circumstances of the case, the defendant was not entitled to notice to quit. A verdict was found for the plaintiff, which was now moved to be set aside.

*M. T. Reynolds*, for defendant. Confidential communications to attorneys and counsel by their clients are privileged; and if the attorney or counsel cannot betray them, no one else can. Here the communication was made to counsel. An attorney's clerk, who is present when a communication is made to his principal, cannot be examined. (11 Com. Law. R. 466. 12 id. 85. 1 Peters' Cir. R. 366. 6 Esp. 113.) The relation in which the witness and the defendant stood to each other at the time of the communication, ought to entitle the defendant to the protection of this rule of evidence.

An adverse possession was shewn. Wemple entered into possession, previous to the death of Visscher, under a promise that the land should be given to him. A parol gift is as effectual to support an adverse possession as a parol conveyance. (13 Johns. R. 120. 6 Cowen, 632.) Besides a conveyance may here be presumed.

If the defendant could be considered as a tenant at will, he was entitled to notice to quit.

*D. Cady*, for the plaintiff. A communication intended to be confidential, should not be made in the hearing of third persons. Where a necessity exists that another should be made privy to the communication between the client and his counsel, as where an *interpreter* must be resorted to, there is reason in the rule for extending the privilege; not otherwise.

There can be no adverse possession in this case. The property was devised to the wife of Wemple in 1778. She died but 14 years since. Her husband could not hold adversely to her, nor could any one deriving title from him. There is no fact or circumstance on which to found the presumption of a conveyance. The defendant was not entitled to notice to quit.

*By the Court, SAVAGE, Ch. J.* The counsel himself cannot disclose a communication made to him by his client relative to a case in which the relation of client and counsel exists; but that privilege is confined to counsel, to an interpreter, and perhaps to the clerks of an attorney or counsel, though as to the latter the cases differ. But if a party makes communications to counsel in presence of persons in no way connected with the counsel, such persons are bound to disclose what they may have heard.

The fact being shewn that the defendant held under Wemple, the question arises, could his possession be adverse as against the lessors? I think not. The property belonged to Wemple's wife, and having issue, it was his during his life; at his death it went to the heirs of his wife. Under such circumstances the possession is not adverse.

It is contended that the court are bound to presume a conveyance by deed from Visscher to Wemple and wife. Did nothing appear in the case as to Visscher's disposition of the lot subsequent to his promise to convey, perhaps such presumption might legitimately be made; but it appearing that the promise was fulfilled by a devise of the property, the court cannot presume that the testator would have made such devise after he had given a deed to his daughter and her husband. The presumption, therefore, is the other way. The judge decided that Wemple was tenant at will, and so I think he was during the life of Visscher, who might have dispossessed him or French at pleasure. And the defendant was not entitled to notice to quit; 1. Because he had disclaimed any tenancy, by claiming to be the owner of the premises; and 2. Because in fact when the suit was commenced nothing like a tenancy existed. After the death of Visscher, Wemple or his grantee had an estate for the life of Wemple, and at his death the property vested in the heirs of Wemple's wife, who died before her husband.

The plaintiff is entitled to judgment for one fourth part of the premises.

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v.  
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Hurd  
v.  
Grant

PATIENCE HURD vs. JAMES GRANT.

A writ of dower *unde nihil habet* lies only against the tenant of the freehold.

Where the demandant failed in shewing that the defendant was such tenant, and where it was proved on the part of the defendant that another was tenant of the freehold, the court refused to set aside a nonsuit.

THIS was an action of dower *unde nihil habet*, tried at the Delaware circuit in June, 1828, before the Hon. JAMES EMOTT, one of the circuit judges.

The defendant pleaded several pleas, one of which was non-tenure. The demandant, on the trial of the cause, proved her marriage with one Joseph Hurd, his death, the possession by him, during his life time for several years, of the lot of which the premises demanded were a part, and the possession of the premises by the defendant at the commencement of the suit. The defendant proved that the premises in which dower was claimed was an unenclosed wood lot, and read from the records of the county clerk's office of Delaware a deed bearing date 12th March, 1825, by which the defendant conveyed the premises in which dower was claimed to one John K. Grant. The judge ruled that the action should have been brought against John K. Grant, and nonsuited the plaintiff; to set aside which nonsuit a motion was now made.

*Sherwood & Woodbridge*, for demandant.

*J. A. Spencer*, for defendant.

*By the Court*, MARCY, J. A writ of dower *unde nihil habet* lies only against the tenant of the freehold. (Comyn' Dig. Pleader 2, y. 1. Fitz. N. B. 148.) It has been adjudged by the court of appeals in Virginia, that a suit for dower cannot be brought against a tenant from year to year; that it can be sustained only against the tenant of the freehold having the inheritance, or an estate equal in duration to the life of the demandant. (1 Hen. & Munf. 268.) The freehold of the premises in which dower was demanded in this case was shewn to be in a person other than the defendant, and the defendant had not even the actual possession. The motion to set aside the nonsuit must be denied.

Motion denied.



ALBANY,  
October, 1829.JACKSON  
v.  
TIBBITTS.JACKSON, *ex dem.* THOMAS, vs. TIBBITTS.

THIS was an action of ejectment, tried at the Oneida circuit in April, 1828, before the Hon. NATHAN WILLIAMS, one of the circuit judges.

The defendant was the tenant of the lessor of the plaintiff of a *tavern stand* in the village of Utica. He entered into possession on the 29th May, 1827. No particular time for which he was to hold was agreed upon, nor was the rent fixed between the parties. In the month of November, 1827, the defendant cut through a partition in the second story of the house, and placed a door leading into a bedroom, and put a window in the door of the cellar kitchen. These alterations were made without the permission of the lessor; but instead of being injurious, were beneficial to the premises. The defendant daily passed the premises, and was frequently in the house, and received various payments on account of rent between August, 1827, and February, 1828. This suit was commenced in February, 1828, to recover the possession of the premises, on the ground of the tenants's having forfeited his interest by the commission of waste.

The judge charged the jury that the cutting through the partition wall and putting in a door, and the other acts of the defendant, being done without the permission of the lessor, worked a forfeiture of the defendant's rights as a tenant, unless such forfeiture had been waived by the lessor; and as to such waiver he directed the attention of the jury to the evidence. The jury found a verdict for the plaintiff, which was now moved to be set aside.

*C. P. Kirkland*, for defendant. The defendant was a tenant from year to year, and if the act done were considered waste, it would not work a forfeiture, but only subject the party to an action of waste. (1 R. L. 62.) Waste is that which does a permanent injury to the inheritance, (7 Johns.

Where a jury would not be warranted by the evidence in an action under the statute for waste to find a verdict for the plaintiff, a judge is not authorized, in an action of ejectment founded on an alleged forfeiture for waste, to instruct a jury that the acts complained of simply because done without the permission of the landlord, work a forfeiture of the tenant's right: he should submit the question to the jury to determine whether the acts done were in fact prejudicial to the plaintiff's interest.

*It seems*, that if waste be committed in a dwelling house, part of the property demised, only such parts of the dwelling house are forfeited as the waste is committed in.

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October, 1829.

Jackson  
v.  
Tibbits.

232, and cases cited ; ) and though, in 18 Johns. R. 434, it is said that the tenant cannot under pretence of advantage to the reversioner, change the *nature* of buildings, it is insisted that here no such change was made. The alteration did not render the house less convenient for a tavern, but on the contrary made it more convenient. But whether the act amounted to *waste* or not, should have been submitted to the jury. Besides, if there was a forfeiture, it was waived by the receipt of rent.

*H. R. Storrs*, for plaintiff. In cases of injuries to farms, it is proper to submit to the jury the question, whether or not the acts complained of are of a permanent injury to the inheritance ; but this is not necessary where the injury is done to a dwelling house. Can it be allowed to a tenant to alter the plan of a house, to new model it, to break down partitions, to convert chambers into bedrooms, or to make a tavern of a private dwelling house ? Whether injurious to the inheritance or not, it is *waste*, and the landlord is entitled to recover the thing wasted ; not a door or a window, but the house itself, it being an entirety. The acceptance of rent is no waiver, unless the rent accrued subsequent to the act done, and is received by the landlord with a full knowledge of the facts of the case.

*By the Court*, MARCY, J. The very term *waste* implies the idea of detriment to the landlord or reversioner. The party who recovers for it, when he brings his action of waste, not only recovers the *locum devastum*, but treble damages. Without damage, it would seem that there could be no waste : indeed, *Blackstone* defines waste to be whatever does a lasting damage to the freehold or inheritance. (2 Black. Comm. 281. See, also, Bac. Abr. tit. Waste c.) It cannot be pretended that the tenant has committed waste in this case by converting the premises to purposes different from those for which they were demised.

If the action had been under the statute for waste, and the defendant had pleaded no waste committed, the jury would not have been authorized to find a verdict for the plaintiff, unless they had been satisfied that the acts complained of as

waste were prejudicial to the estate of the plaintiff. The evidence would not, I think, have warranted such a finding, and if not, the judge erred in instructing the jury that the acts complained of, being done without the permission of the lessor, worked a forfeiture of the defendant's interest. At least, he should have submitted the testimony to the jury to determine whether the acts done were in fact prejudicial to the plaintiff's property in the premises.

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October, 1829.

Jackson  
v.  
Tibbitts.

But on the assumption that the acts did amount to *waste*, the right of the tenant to the whole premises was not forfeited. The forfeiture would not extend beyond the *house*, and I have very great doubt whether it would include the whole of it. *Sheppard* says, "That the plaintiff in this suit (action of waste) if he recover, shall recover treble damages and the place wasted, that is, if it be the whole house, the whole house; if it be one or two rooms *sparsim*, those rooms; if it be in a close, so much of the close as is wasted." (Faithful Counsellor, 553. Lord Coke says, "If waste be done in houses, so many rooms shall be recovered wherein there is waste done; but if waste be done *sparsim* throughout, all shall be recovered." (Co. Litt. 54 a.)

It is not necessary to examine whether the facts warrant the inference that the plaintiff waived the forfeiture, if it was ever incurred, or assented to the alterations relied on as evidence of waste. The proof did not, in my opinion, warrant the position taken by the judge in his charge to the jury, and I am therefore for granting a new trial.

New trial granted.

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October, 1829.

McNair  
v.  
Gilbert.

MCNAIR VS. GILBERT.

Where the existence and amount, and loss or destruction of promissory notes is shewn, and it does not appear affirmatively that the notes were negotiable, the plaintiff is entitled to recover on the lost notes.

The moral obligation resting upon a debtor who has obtained an insolvent's discharge, is a good consideration for a subsequent promise to pay a debt.

A promise to a petitioning creditor is equally valid as to an opposing creditor.

The omission by an insolvent to state the cause or consideration of his indebtedness to his creditors, vitiates his discharge.

A variance between a bill of particulars and the evidence produced will not be regarded, unless the bill was calculated to mislead.

THIS was an action of *assumpsit*, tried at the Oswego circuit, in December, 1827, before the Hon. NATHAN WILLIAMS, one of the circuit judges.

The declaration contained the common money counts. The defendants pleaded, 1. Non assumpsit; 2. Non assumpsit *infra sex annos*; and 3. An insolvent discharge under the act of 1813, obtained 27th April, 1818. The plaintiff took issue upon the second plea, and to the third replied a new promise; which the defendant denied by a rejoinder. On the trial of the cause the plaintiff claimed to recover upon four promissory notes, three bearing date 11th August, 1817, amounting together to the sum of \$133,50, and a fourth bearing date 7th November, 1815, for \$19,56; and to prove the notes, offered in evidence the *insolvent papers* of the defendant on file in the clerk's office of the county of Oswego; which were objected to by the defendant, but received by the judge. From these papers it appeared that the defendant, in the account of his creditors, acknowledged his indebtedness to the plaintiff in the sum of \$173,06, but omitted to state the consideration of such indebtedness; the plaintiff was a petitioning creditor; among the affidavits of petitioning creditors presented to the judge who granted the defendant's discharge, was the affidavit of the plaintiff stating the defendant to be indebted to him in the sum of \$173,06, and describing the notes now claimed to be recovered; the plaintiff was appointed one of three assignees of the estate and effects of the insolvent. The plaintiff proved the loss or destruction of the notes, not being able to find them amongst his papers on the most diligent search. A son of the plaintiff also testified that on a similar search amongst the papers of his father, he had been unable to find them.

The plaintiff then offered to prove the new promise of the defendant to pay the note subsequent to the granting of the insolvent discharge. This evidence was objected to on vari-

ous grounds : 1. That the plaintiff was not entitled to recover upon *lost* notes, without shewing that they were *not* negotiable ; 2. That the plaintiff, having been a petitioning creditor for the discharge of the defendant as an insolvent debtor, his right of action was forever gone, and there was no consideration for the new promise ; and 3. That there was a variance between the bill of particulars served on the defendant and the proof produced ; in the bill the notes being described as bearing interest from their date, and the proof not supporting the statement. The judge overruled the objections ; reserving the questions, however, for the decision of this court. The plaintiff then proved the new promise by several witnesses, and the jury found a verdict for him for \$292,16, allowing interest from the date of the defendant's account presented to the judge with his petition.

ALBANY,  
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McNair  
v.  
Gilbert.

*J. A. Spencer*, for plaintiff. The demand was conclusively shewn by the affidavit of the plaintiff, adopted by the defendant on presenting his petition for a discharge, and acknowledged in his account of creditors.

The existence, contents and loss of the notes being shewn, the plaintiff was entitled to recover, it not appearing that the notes were *negotiable*, or had been endorsed. If such were the facts, they should have been shewn by the defendant. (10 Johns. R. 104.) Where it did appear that the note was negotiable, the plaintiff was not suffered to recover. (3 Cowen, 303.)

The moral obligation of the defendant to pay his debts, was a good consideration for the new promise. (Cowp. 290, 544. 7 Johns. R. 37. 14 id. 178. 1 Chitty's Pl. 40, note.)

The fact of the plaintiff having been a petitioning creditor and assignee, cannot vary his rights. The equitable duty to pay a petitioning creditor is as strong as to pay an opposing creditor. In either case, the debt is due in conscience, and the new promise revives the remedy.

There was no variance between the bill of particulars and the proof. At all events, the plaintiff was entitled to recover under the count of *insimul computassent* upon the defend-

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ant's account of creditors, acknowledging an indebtedness in a specific sum.

The discharge was *void* in the defendant's omitting to state the cause and consideration of the plaintiff's debt. (Statutes, vol. 4, 46 b.)

*S. L. Edwards*, for defendant. The affidavit of the plaintiff accompanying the insolvent papers was inadmissible evidence. The plaintiff was thus allowed to establish his demand by his own oath.

It was not shewn that the notes were *destroyed*; they therefore may be *lost*, and in the hands of a third person, who may compel payment. If negotiable and lost, the plaintiff cannot recover upon them. (3 Cowen, 303.) In the absence of proof of the negotiability of a note, the court permitted a recovery in 10 Johns. R. 104: but the opinion in that case seems to be based upon the peculiar circumstances of the parties. The reason of the decision in 3 Cowen, 303, is opposed to the plaintiff's recovery here.

The plaintiff having been a petitioning creditor for the discharge of the defendant as an insolvent debtor, is differently situated from a creditor who did not petition. The debt of the latter is discharged by operation of law; that of the former by voluntary release. By his act the creditor virtually agreed that if the defendant might be discharged, he would accept a dividend of his estate. The debt, therefore, is gone, and there is no consideration to support the new promise.

The papers produced did not shew that the notes drew interest: there was, therefore, a variance between the bill of particulars and the proof.

*By the Court*, SAVAGE, Ch. J. Slight variances between the bill of particulars and the evidence will not be regarded. The true rule on the subject seems to be, that variances are immaterial, unless they are calculated to mislead the defendant. Such an effect could not have been produced from the claim of interest in this case; the objection was therefore properly overruled.

It did not appear whether the notes were negotiable or not. It seems to have been decided in this court, (10 Johns.

R. 104,) that where a note is shewn to be lost or destroyed, and the fact does not appear whether it was negotiable or not, the court will not presume it to have been negotiable; but if it appears to be negotiable, the plaintiff cannot recover in a court of law. (3 Cowen, 303.) The plaintiff, therefore, having shewn the existence and amount, and loss or destruction of the notes, and it not appearing that they were negotiable, he is entitled to recover, unless he is barred either by the statute of limitations or the defendant's discharge.

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That the plaintiff was a petitioning creditor and assignee of the defendant in his insolvent proceedings, can place him in no worse condition than any other creditor of the insolvent. Where an insolvent debtor receives a valid discharge under the statute, he is legally exonerated from the payment of his antecedent debts, but the moral obligation remains. This obligation is a sufficient consideration for a new promise. (Cowp. 290, 554. 7 Johns. R. 37. 14 id. 178. 1 Chitty, 40 n.)

The promise in this case was abundantly sufficient. It was a message to the plaintiff that the defendant would pay him his debt and all he owed him in a few days. This was enough in reference to either the plea of the statute or of the discharge. As to the discharge, however, it appears that the insolvent had neglected, in the account of his creditors, to state the consideration of his indebtedness to the plaintiff. This omission, by the act of 1817, renders the discharge absolutely void. I am of opinion, therefore, that none of the objections are well taken, and that the plaintiff is entitled to judgment.

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McLACHLAN vs. WRIGHT.

Where a mortgage of personal property was executed by a brewer of his stock on hand and the utensils of his trade, and it appeared that he was embarrassed with debts at the date of the mortgage, that the transaction was kept secret from those in his employment, that he not only continued in the possession of the property, but used and disposed of it as absolute owner, it was held, that a verdict of a jury finding against the bona fides of the transaction was right, and the court affirmed a judgment entered on such verdict, although the charge to the jury on the trial of the cause was objectionable.

ERROR from the New-York common pleas. This was an action of trover, brought by McLachlan against Wright for the taking of two horses, two drays and the harness of the same, a pleasure wagon and harness, six or seven kegs of beer, and several empty hogsheads and barrels. The property was taken by virtue of executions on judgments in favor of Wright against one Bacon. On 24th November, 1827, Bacon (a brewer) being indebted to McLachlan in the sum of \$1523, executed to him a mortgage of his stock of beer, malt and hops, together with the brewing utensils, hogsheads, barrels and kegs in the brewery; and included in the mortgage the articles above enumerated taken by the defendant, together with his household furniture and moveables in his dwelling house adjoining the brewery. The mortgage was to be void on payment of the sum of \$1523 on or before the 24th May, 1828, and a stipulation was contained in it, that Bacon was to remain in the quiet and peaceable possession of the property, and in the full and free enjoyment of the same until default should be made in the payment of the money. The property mortgaged was worth about \$3000. Bacon was involved in debt in the fall of 1827; the mortgage was executed to secure McLachlan, and to prevent the other creditors of Bacon from taking his property and breaking up his business. After the mortgage he continued in possession and carried on business with the knowledge of McLachlan as he had done before, in his own name, buying and selling without accounting to McLachlan or being required so to do; McLachlan being frequently in the brewery, but never interfering in the business, or intimating that he had any control over the property; no one being known by the workmen in the brewery as the owner, or as having any claim to the property except Bacon. In the month of March, 1828, the property, for the taking of which the action was brought, was levied upon by the direction of the defendant and sold. The judge in his charge to



the jury, left it to them to determine whether the transaction was *bona fide* or a mere cover to protect the property from the creditors of Bacon; and instructed them that it was questionable whether a mortgage of goods and chattels could be a lien upon such property unless it was taken possession of by the mortgagee. That this case was not like that of *Bissel v. Hopkins*, (3 Cowen, 166,) in which it did not appear that the mortgagee had *never* been in possession; and that the circumstances of this case were clearly distinguishable from that, and did not come within the principles established by it. The jury found for the defendant, on which judgment was entered. The cause was now brought up on a bill of exceptions.

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*J. A. Spencer*, for the plaintiff in error. The charge of the judge was erroneous, and directly calculated to mislead the jury. Had it appeared that the property taken by the defendant had been acquired by Bacon subsequent to the mortgage, and was not a portion of that conveyed to the plaintiff, the jury might have been warranted in finding a verdict for the defendant; but under the evidence in this case the verdict was entirely unauthorized.

*W. Ketcham*, for defendant in error.

*By the Court*, MARCY, J. The judge in the court below intended to confirm his charge to the law of the case of *Bissel v. Hopkins*, (3 Cowen, 166,) but he mistook in supposing, as he seems to have done, that the mortgagee in that case had been in the actual possession of the articles mortgaged. It will appear from a critical examination of the facts of that case, that Hopkins, the mortgagee, never had the actual possession of the property in dispute. Other cases are to be found in the books similiar in this respect to *Bissel v. Hopkins*. The circumstances of that case were considered sufficient to repel the *prima facie* evidence of fraud arising from the continuance of the possession of the mare in Dryer, the original owner. In the case before us, I discover no circumstances to evince the *bona fides* of Ba-

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con's possession of the property after the transfer to the plaintiff. The facts appear to me to warrant the verdict. Bacon was embarrassed; the transfer of the property was kept secret, even from those in his employment; he not only had the possession of the property, but used and disposed of it as the absolute owner. No better reason can be assigned for its continuance in his possession after he had sold or mortgaged it to the plaintiff, than must have existed in every case where this continuance of possession has been adjudged fraudulent. Although the charge of the judge may be objectionable, the verdict was right, and the judgment ought not to be disturbed. (2 Wendell, 596.)

Judgment affirmed.

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HOLLEY vs. D. MIX and I. I. CLUTE.

*False imprisonment* will lie against an officer and a complainant in a criminal prosecution, where they combine and extort money from a party accused by operating upon his fears, although the party be in the custody of the officer, under a valid warrant, issued upon a charge of felony.

THIS was an action for false imprisonment, tried at the Schenectady circuit in January, 1828, before the Hon. WILLIAM A. DUEB, then one of the circuit judges.

In June, 1827, Stephen Mix, a brother of the defendant D. Mix, obtained from E. L. Davis, Esq. a justice of the peace of the county of Schenectady, a warrant against the plaintiff on a charge of having feloniously stolen a ten dollar bank bill. Stephen Mix was deputed to serve the warrant, and went in pursuit of the plaintiff, whom he overtook on the canal a few miles west of Schenectady; and having lost the warrant, he only requested the plaintiff to return, which the plaintiff refused to do. Stephen Mix then obtained another warrant from I. I. Van Epps, Esq. another justice of Sche-

An arrest of a felon may be justified by *any person* without warrant, whether there be time to obtain one or not, if a felony has in fact been committed by the person arrested.

If an innocent person is arrested upon suspicion by a private individual, such individual is excused, if a felony was in fact committed, and there was reasonable ground to suspect the person arrested.

But if no felony is committed by any one, and a private individual arrest without warrant, such arrest is illegal; an officer, however, would be justified if he acted upon information from another which he had reason to rely on.

In an action for *false imprisonment* against two, where *several* damages are given, the plaintiff may cure the irregularity by entering a *nolle prosequi* against one, and taking judgment against the other.

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nectady county, on the same charge, which was issued against John Doe, the name of the plaintiff not being known by the complainant, and delivered to the defendant Clute, who was informed by Stephen Mix that the plaintiff had stolen a ten dollar bill belonging to D. Mix, the other defendant. Clute and Stephen Mix pursued and overtook the plaintiff. When they did overtake him, Stephen Mix said he wanted the plaintiff as a witness in relation to a ten dollar bill dropped in a tailor's shop in Schenectady; but Clute, the constable, did not hear this remark. Clute arrested the plaintiff, and carried him before the justice Van Epps, where the plaintiff stated his name, and the justice altered the warrant by inserting his name, and then re-delivered it to the constable. The plaintiff asked permission to go to Schenectady to settle with the defendant D. Mix, or to obtain counsel. The justice directed the constable to keep the plaintiff in custody until the next morning, when he would be tried by a *special sessions*; but he appointed no time or place for the holding of the sessions, nor did he designate or summon any justices to associate with him in holding the same, nor did the complainant or the constable make any inquiries respecting it. This justice heard no more of the matter. The constable Stephen Mix and the plaintiff then proceeded to Schenectady, and went directly to the shop of the defendant D. Mix, who told the plaintiff that the matter could not be settled, and directed the constable to take the plaintiff to the justice's office to be tried according to law. The constable, instead of going to the justice's office, took the plaintiff to a tavern, where he was followed by the defendant D. Mix. The constable and the plaintiff went into a back room together. D. Mix did not go with them, but whilst they remained in the room, walked in the hall of the house. The constable came out of the room and handed to D. Mix ten dollars. Whilst the plaintiff was detained at the tavern, E. L. Davis, Esq. the justice who issued the first warrant, repeatedly told the constable and D. Mix to bring the plaintiff before him at his office. He was not brought. The constable told justice Davis that Mix had got his money and he his costs, and Mix confessed that the plaintiff had given him

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eleven dollars to settle the matter. Evidence was given, in support of the charge, that a felony had been committed, but it entirely failed to establish the fact.

The evidence being closed, several objections were urged to the plaintiff's right to recover, which were overruled by the judge, who charged the jury that the warrant issued by justice Van Epps previous to the insertion of the name of the plaintiff was no protection to the officer; that an officer has no authority to arrest a person upon a criminal charge without warrant and upon information only, except in cases where there is not time to obtain a warrant, and where an escape would take place unless the arrest was made; but that in this case, there being sufficient time to obtain a warrant, the constable was not justified to arrest upon information. That if the jury believed that the defendants acted in concert in taking the plaintiff into the back room of the tavern, and that they intended to keep him in custody, and to work upon his fears for the purpose of extorting money from him, they were both liable, and a verdict ought to be rendered against them. The jury found for the plaintiff, and assessed damages against Clute at six cents, and against Mix at \$25. The cause came before the court on a bill of exceptions.

*A. C. Paige*, for defendants, moved to set aside the verdict. The plaintiff's remedy, if any, was by action on the case for a malicious prosecution, or for oppression in the execution of the warrant. Trespass will not lie against an *officer* for an arrest made on information that a crime has been committed, although no warrant is issued. (1 Chitty's Crim. Law, 12 to 18.) An arrest may be made on a warrant, though the name of the person charged is not inserted in the process. (id. 32, 33.) The defendant Mix did not interfere in the arrest of the plaintiff, nor is he chargeable with his subsequent imprisonment; what he did was after a legal warrant was in the hands of the officer, and in aid of him. The charge of the judge was erroneous.

*H. R. Storrs*, for plaintiff. No one, not even an officer, can arrest without warrant, where a crime is charged to have

been committed, unless there is no time to obtain it. (2 Hawkins, b. 2 ch. 13, § 11.) The plaintiff was arrested on a warrant against John Doe. The subsequent alteration of it by inserting the name of the plaintiff did not justify the previous unlawful arrest. But allowing the process to have been regular the abuse of it by the constable and the other defendant, in extorting money from the plaintiff under pretext of a charge not pretended to have been substantiated at the trial, deprived them of the protection which they otherwise might have been entitled to.

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The plaintiff asks leave to enter a *nolle prosequi* as to the defendant Clute, the jury having severed in the damages assessed by them. There can be no severance, even where the pleas, as in this case, are several. The application may be made now, in the same manner as if the *postea* were now returned. (5 Burr. 2790. 1 Saund. 207, n. 2.)

*By the Court*, SAVAGE, Ch. J. There is certainly an inaccuracy in the charge of the judge, as stated in the bill of exceptions. The judge is represented as lying down the broad proposition, that a felon can in no case be arrested without warrant, when there is time to obtain one. My understanding of the law is, that if a felony has in fact been committed by the person arrested, the arrest may be justified by any person without warrant, whether there is time to obtain one or not. If an innocent person is arrested upon suspicion by a private individual, such individual is excused if a felony was in fact committed and there was reasonable ground to suspect the person arrested. But if no felony was committed by any one, and a private individual arrest without warrant, such arrest is illegal, though an officer would be justified if he acted upon information from another which he had reason to rely on. These principles will be found, substantially, in 1 Chitty's Crim. Law, 15.

The case of *Samuel v. Payne and others*, (Douglass, 359,) supports the distinction in the above proposition. In that case a search warrant was taken out by Hall, one of the defendants, upon a charge of theft; but the warrant did not authorize the arrest. The goods were not found, but the plain-

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tiff was arrested and carried before a magistrate and discharged. On the trial, Lord Mansfield laid down the law, that if a felony has been committed, any man upon reasonable probable ground of suspicion may justify apprehending the suspected person and carrying him before a magistrate; but if no felony has been committed, such arrest can not be justified by any body. The court, however, thought the rule too narrow, and said that if any person charge another with felony and desire an officer to take him in custody, such charge will justify the officer, though no felony was committed; but the person making such charge will be liable. And upon a new trial a verdict was found against Hall, but in favor of the officers.

A similar decision was made in *Hobbs v. Branscomb and others*, (3 Camb. 420,) where the plaintiff had been improperly arrested upon a charge of felony where no felony was committed. For the defendants, the case of *Samuel v. Payne* was relied on and a nisi prius decision of Mr. Justice Buller, in which he held that "If a peace officer of his own head takes a person into custody on suspicion, he must prove that there was such a crime committed; but if he receives a person into custody on a charge preferred by another of felony or breach of the peace, then he is to be considered as a mere conduit, and if no felony or breach of the peace was committed, the person who preferred the charge alone is answerable." Lord Ellenborough said this rule appeared to be reasonable, and that injurious consequences might follow if peace officers, under such circumstances, were personally responsible, should it turn out that in point of law no felony had been committed.

It was not contended upon the trial that a felony had been committed; an action would therefore lie against Stephen Mix, but not against the constable Clute, provided the arrest was made with a *bona fide* intention of bringing a supposed offender to justice. Thus far there is no evidence against David Mix; and had the case stopped here, a verdict for the defendants should have been directed.

The warrant against John Doe did not authorize the arrest of any person other than John Doe. It was altered by

inserting the name of the present plaintiff, and then it was a justification for all subsequent regular acts of all concerned in its execution. At this stage of the proceedings a shade of suspicion is cast upon the *bona fides* of the whole transaction. The justice directs the constable to take the supposed culprit to Schenectady for trial, but did not attend for that purpose nor take any steps preparatory thereto, nor could in fact any trial be had within 48 hours, unless by the consent of the accused. It was the duty of the justice to have taken the examination of the person brought before him; instead of doing so, he sent him to Schenectady. When there the defendant, D. Mix, directed the constable to take him before justice Davis, who had issued the first warrant, and the justice gave the same direction; but the constable went to a tavern, and so did the defendant Mix, and while the constable was probably frightening the prisoner in a back room, the defendant Mix was walking the hall, waiting the result of the conference between the constable and the prisoner. He gave no further orders to go before the justice, and when the constable gave him ten dollars, he said no more about the impossibility of a settlement. It was in reference to these facts that the judge charged the jury, that if the object of the two defendants was to extort money from the prisoner by working upon his fears, they were liable in this action. In this I think the judge was right. Had the constable performed his duty by taking the plaintiff before a magistrate he would have been justified; but having lent himself, according to the finding of the jury, to the unholy purpose of oppression, he lost the protection which the law would give him in the discharge of his official duty and became a trespasser, and so did David Mix who acted in concert with him. There is no reason, therefore, for granting a new trial. And as there can be but one assessment of damages, the plaintiff is permitted to enter a *nolle prosequi* against Clute, and perfect judgment against Mix. This practice is justified by the cases cited, (1 Saund. 207, n. 2,) and the reason there given seems to be sound; that as this action is several as well as joint, and as the plaintiff might originally have commenced his action against one only, so after

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verdict he may elect to take his damages against either of them; and where several damages are given, the plaintiff may cure the irregularity by entering a *nolle prosequi* against all but one, and take judgment against him alone. (6 T. R. 199.)

The motion for a new trial is denied, and leave is given to the plaintiff to enter a *nolle prosequi* against Clute upon payment of his costs.

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DOX and MERCER vs. DEY.

Agreements are independent where, on the one hand an article of merchandise is sold and agreed to be delivered on demand, and on the other payment is deferred until five months after the date of the contract. An action in such case may be maintained for the non-delivery of the article although not demanded until after the time stipulated

THIS was an action of *assumpsit*, tried at the Seneca circuit, in April, 1829, before the Hon. DANIEL MOSELY, one of the circuit judges.

The action was founded on a contract in these words: "I have this day sold to John L. Dox & Co. twelve hundred and eighty bushels of first quality merchantable wheat, to be delivered on board of boats at or near the store-house of David Brooks, in the town of Romulus, at any time the said Dox & Co. may require after the first day of April next; and am to receive for the same seventy five cents per bushel, on the first day of September next, and have received one dollar on account of the same. Geneva, March 26th, 1828. (Signed) David Dey;" and underneath it was written this memorandum: "We agree to the above. (Signed) John L. Dox & Co."

for the payment of the money; and performance on the part of the plaintiff need not be averred.

The non-payment of the *whole* consideration is no excuse for the non-performance of a contract, where a *part* is received, unless it clearly appears that the payment of the whole consideration was a condition precedent.

In declaring in *assumpsit* for the breach of a contract, it is not necessary to set forth the payment of a part of the consideration, admitted by the contract to have been received.

Nor where the contract is to deliver on demand, is it necessary to allege the precise day of the demand; the day not being material.

In assessing the damages for the breach of a contract, the jury may allow interest by way of damages.

A verdict in *assumpsit* for an amount exceeding the damages claimed in the declaration, is no cause for a new trial.

Where such verdict is found, the plaintiff will not be permitted to amend his declaration by increasing the damages, unless he abandons his verdict, pays the defendant's costs of the trial and of resisting the motion, and consents to a new trial.



The declaration contained three counts; in the first count, the contract was truly set forth. The consideration alleged for the promise of the defendant was the promise of the plaintiffs to accept and receive the wheat, and to pay for it at the rate or price specified in the contract, without averring the payment of the one dollar mentioned in the contract as part of the consideration of the promise or agreement of the defendant; and a request was stated to have been made after the 1st day of April, to wit, on the 20th day of August, 1828, for the delivery of the wheat, and a readiness averred to receive it. The plaintiffs proved the contract, a tender on the eighteenth day of September, 1828, of the stipulated price, a demand of the wheat on the twentieth day of September, 1828, the refusal on the part of the defendant to deliver it under the contract, and that the value of wheat on the day of the demand was \$1.25 per bushel.

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The plaintiffs resting solely upon the first count of the declaration, the defendant moved that they be nonsuited for a variance between that count and the proof: 1. In that the count did not aver the payment of one dollar specified in the contract as part of the consideration of the defendant's promise; and 2. That the demand of the wheat was averred to have been on the 20th August, whereas by the proof it was shewn not to have been made until the 20th September. The motion for a nonsuit was denied.

The judge charged the jury that a sufficient *tender* had been proved to entitle the plaintiffs to recover; that they were entitled to the value of the 1280 bushels of wheat on the day of the demand; and that the jury might allow interest by way of damages if they thought proper so to do. The jury found a verdict for the plaintiffs for \$1670.92 damages.

The defendants now moved to set aside the verdict on a case made, and the plaintiffs asked leave to amend the declaration by increasing the damages *demanded* from \$1000 to \$2000.

*D. Hudson*, for defendant. The sum of one dollar recited in the contract to have been received by the defendant, forming a part of the consideration of his promise, and being

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a material part of the contract, ought to have been averred. Where a promise is founded on several distinct considerations, all must be averred. (3 Caines, 286. 5 T. R. 482.) The proof must correspond with the declaration, and a variance between the contract declared on and that proved at the trial is fatal. (Douglass, 666. 10 Johns. R. 418.)

The defendant was not bound to deliver the wheat until demanded. The plaintiffs were therefore bound to aver and prove a demand. They averred a demand on the 20th August, but did not prove it to have been made until the 20th September. On the day averred in the declaration the plaintiffs' cause of action had not accrued. There was, therefore, a material variance between the declaration and the proof.

The money having become due according to the terms of the contract previous to the demand of the wheat, the payment of the money became a *condition precedent*, and the plaintiffs were bound to have averred in their declaration payment, or a tender or a readiness to pay. (12 Johns. R. 209. 2 id. 207. 1 Salk. 171.) Had the wheat been demanded previous to 1st September, the defendant would have been obliged to have looked to his contract for his remedy; but the demand having been postponed until the money became due, the delivery of the wheat and the payment of the money were concurrent acts, and the plaintiffs having failed to pay on the 1st September, the defendant was discharged. He was not bound to keep the wheat for the plaintiffs after that day. (8 Johns. R. 257. 13 id. 359.) A subsequent *tender* would not help the plaintiffs.

The judge erred in instructing the jury that they might allow interest on an unliquidated demand by way of damages; and the verdict is erroneous, being for a greater amount than is claimed in the declaration.

*H. V. R. Schermerhorn & B. Whiting* for plaintiffs. The consideration for the promise of the defendant, was *the promise* of the plaintiffs to pay  $7\frac{1}{2}$  per bushel for the wheat. The acknowledgement in the contract of the receipt of one dollar could have no other effect than a receipt of so much money endorsed on the contract would have had.

The day of the demand for the delivery of the wheat is not *material*. The declaration avers a demand *after* the first day of April, and states the day of the demand under a *scilicet*. The precise day, therefore, need not be proved.

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The promises were *independent*, and the enforcement of the defendant's promise did not depend upon a previous performance by the plaintiffs. Either party was entitled to his action on a failure by the opposite party in the performance of his agreement. (1 Saund. 320, a. note. 1 Salk. 174. 6 T. R. 570. Strange, 569. 2 Johns. R. 145, 272. 10 id. 90, 204.) Besides, here was an absolute sale of the wheat; by the payment of the one dollar, the property passed to the plaintiffs. The defendant was at liberty to sue for the stipulated price without even tendering the wheat. (5 T. R. 409. 1 Saund. 320, a. note.)

A *tender* of the money was not necessary; but if necessary, the tender made in this case was sufficient.

As to the *interest*, the judge correctly instructed the jury that they, in their discretion, might allow it by way of damages. (1 Johns. R. 315. 2 id. 280. 8 id. 446.)

*By the Court*, MARCY, J. It was contended on the trial, and is insisted here, that there is a fatal variance between the first count of the declaration and the agreement produced in support of it, because in declaring, notice is not taken of the one dollar stated to have been paid on entering into the contract. What is said in relation to this payment is not a substantive part of the agreement, and any mention of it in pleading might therefore have been dispensed with without prejudice to the party setting up the agreement. It was nothing more than an acknowledgment incorporated in the agreement that one dollar towards the consideration had been paid.

Another variance between the proof and the declaration is insisted on by the defendant. By the terms of the contract, the wheat was to be delivered on demand at any time after the 1st of April. The declaration alleged a demand and refusal on the 20th of August, and the proof does not shew a demand till the 18th or 20th of September. It is true, as contended for by the defendant, that no cause of ac-

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tion existed against the defendant on this contract until a demand by the plaintiffs and a refusal to deliver by the defendant; but I apprehend that it is a mistake to suppose that the precise day on which the refusal took place need be specified. In proving the breach of a contract, the party is not, in a case like this, confined to the day stated in the declaration. It is sufficient if he show a cause of action which arose before the commencement of the suit.

It is said, on the part of the defendant, that this is a case of mutual and dependent promises, and that the plaintiffs are not entitled to recover, they not having averred a readiness to pay and proved a tender. In opposition, it is asserted that the promises are independent; and if not, that a sufficient tender was proved on the trial. It is indisputable, that where promises or agreements are independent of each other, each party may have a right of action before he has performed on his part. No readiness is averred on the part of the plaintiffs to pay for the wheat, nor do I consider the proof as establishing a legal tender. The objection of the defendant, therefore, to the recovery in this case must prevail, unless the agreement to deliver the wheat is independent of the agreement to pay for it.

It is often a matter of great difficulty to ascertain the character of contracts in relation to the distinction of their being *dependent* or *independent*, and a solution of the difficulty is only to be sought in the intentions of the contracting parties, to be gathered from the terms used by them. All the cases on this subject were examined by Sergeant Williams, in a note to *Pordage v. Cole*, (1 Saunders. 320,) and certain rules are there laid down for construing contracts with reference to the distinction now under consideration. By these rules, which are not only established by the high authority of the annotator on Saunders' reports, but are adopted by Mr. Chitty, (1 Chitty's Pl. 313,) all doubt as to the contract in question is removed. If a day be appointed for the payment of money, and it is to happen or *may* happen before the thing which is the consideration of the money is to be performed, an action may be brought for the money *before* performance. (1 Saunders. 320. n. 4.) Let this rule be applied

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to this case. The money for the wheat was to be paid on the 1st of September, and the wheat was to be delivered when demanded, after the first of April succeeding the date of the contract. The thing to be performed as the consideration for the money was the delivery of the wheat; and as it was optional with the purchasers to demand it before or *after* the money was to be paid, the day for the payment might happen before the thing to be performed. The wheat was not demanded till the 18th of September; but there is no doubt the defendant might have sustained his action for the money, if he had seen fit to sue after the first and before the 18th of that month; and if the agreements would have been construed *independent* as to one party, they necessarily are so as to the other.

A part of the consideration (a small part to be sure) was paid; and it seems to be settled, that where a person has received a part of the consideration for which he has undertaken to do some act, he cannot excuse himself for not performing it because he has not received the whole, unless it clearly appears that the payment of the whole consideration was a condition precedent to the performance. I do not think, as the defendant contends, that the delay of the plaintiffs to demand the wheat till after the day stipulated for the payment of the purchase money, thereby made the payment a condition precedent. The original character of the contract could not be changed by the delay to demand the article sold, as long as the right to delay was secured by an express stipulation.

There is nothing in the evidence to warrant the application to this case of the doctrine of the case of *Van Benthuyssen v. Crapsor*, (8 Johns. R. 257.) There was no actual refusal on demand to pay for the wheat; no evidence of inability; no unreasonable delay. There was nothing in the conduct of the plaintiffs that shewed any intention to rescind or abandon the contract on their part, or to authorise the defendant to do so.

The judge did not, as the defendant's counsel seems to have understood him, direct the jury to allow interest on the sum which they should find the wheat to be worth after the de-

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mand; but in ascertaining the plaintiff's damages, he observed they might, if they thought proper from the nature of the transaction, include interest as an item in making up the amount of damages. There was not in this remark any direction contrary to law.

The damages laid in the declaration are \$1000, and the verdict \$1670,92. The excess of the verdict beyond the damages claimed is one of the grounds on which a new trial is asked. With the case are also papers for a motion, on the part of the plaintiffs, to amend the declaration by increasing the amount of the damages laid in it. The court cannot consider this objection on a case made on the part of the defendant, with a view to obtain a new trial, because, until the record is made up, it cannot be ascertained that the plaintiffs will claim more damages than the sum specified in the declaration. They have a right to remit the excess found by the jury; but if they should make up the record and take judgment therein for the whole amount of the verdict, it would be error. The motion on the part of the defendant for a new trial must therefore be denied.

In relation to the plaintiffs' motion to amend, I find no precedent for it in the reports. At the last term of this court, a similar motion was denied upon the ground that such an amendment would be improper, without giving the defendant an opportunity of reducing the damages, which on the trial he had no occasion to do, by reason of the moderate amount claimed in the declaration. Considering the circumstances of this case, we grant the motion to amend, on condition that the plaintiffs give up their verdict, pay the defendant's costs of the trial and of this motion, and consent to a new trial.

Defendant's motion for a new trial denied. Plaintiff's motion to amend granted on terms.

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Kane

v.

The People.

KANE, implicated with others, vs. THE PEOPLE.

ERROR from the Oneida oyer and terminer. The defendants, being the president and two of the directors of the *Mohawk Turnpike Company*, were indicted for a misdemeanor. The fact charged, in which the offence consisted, was that the road of the company, of which they were the president and two of the directors, was and had been out of repair for a length of time. The defendant Kane was convicted, and the others were acquitted. A fine of \$200 was imposed upon Kane, and he brought a writ of error.

The indictment contains two counts. In the first, the incorporation of "The Mohawk Turnpike and Bridge Company," passed in 1800, for the purpose of erecting a bridge at Schenectady, and constructing a turnpike road from thence to Utica, is set forth, and the duties and liabilities of the president and of the directors of the company are described. It is then averred that a road was constructed; that gates were erected and tolls collected; that the road for a distance of 200 rods, extending from the bridge at Utica eastwardly, from the 1st January, 1827, until the finding of the indictment in June, 1827, was greatly out of repair, so as to endanger the lives and property of the good people, &c.; that during the time last aforesaid, David Boyd was president, and Joseph C. Yates and Charles Kane were directors of the company, whose duty it was (as alleged) to keep the road in good order and repair; that the defendants had notice of the premises, and neglected and refused to keep the road in repair. The second count is substantially the same as the first, except that after setting out the act of incorporation of the Mohawk Turnpike and Bridge Company, it is averred that in 1805, an act of the legislature was passed authorizing the company to divide their stock into two parts, and to form two companies, one to be denominated "The Mohawk Turnpike Company," and the other "The Mohawk Bridge Company," the one to have charge of the road, the other of the bridge; that such division did take place, whereby "The

The president and directors of the *Mohawk Turnpike Company* are personally liable to punishment as for a misdemeanor for every neglect to keep the road in good repair. The offence being personal, is punishable by fine and imprisonment, and the judgment is not that the road be repaired.

The offence is joint and several; wherefore some may be acquitted and others convicted.

It seems, that the endeavor of any director in the board of directors to obtain an order for the repair of the road would entitle such director to an acquittal.

Where there are two counts in an indictment for a misdemeanor, one good and the other bad, and the defendant is convicted, the indictment will not be quashed on demurrer, nor the judgment arrested or reversed for that cause.

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Mohawk Turnpike Company" became a body corporate and politic, and the officers of the company became liable to the duties, liabilities and penalties to which the officers of "The Mohawk Turnpike and Bridge Company" were liable and subject by the first act of incorporation; that after the division of the stock, *The Mohawk Turnpike Company* kept up and maintained the gates on the road, and collected tolls, &c.; that from the 1st January, 1827, until, &c. the road was out of repair; and that Boyd was president, and Yates and Kane were directors of the last mentioned company, &c. &c.

By the *fifth* section of the act incorporating "The Mohawk Turnpike and Bridge Company," it is made the duty of the president and directors of the company to keep the road in good repair, (the remainder of the section reads as follows.) "and every neglect to keep and preserve the same road in such repair, shall be taken, judged and deemed a misdemeanor in the president and individual directors for the time being of the said company."

*C. P. Kirkland & A. C. Paige*, for plaintiff in error.

*H. Denio*, (district attorney of Oneida) for the people.

*By the Court*, SAVAGE, Ch. J. Several grounds have been urged as error and relied on for the reversal of this judgment, neither of which can be sustained. It is said, 1. That the act under which the conviction was had does not make the officers *personally* liable. The language of the act is, that every neglect to keep and preserve the road in good repair shall be deemed a misdemeanor in the president and individual directors for the time being of the company. If the *individual* officers are deemed guilty of an offence, they must be *individually* punishable, which of course must be *personal*. No statute was necessary to make the road itself indictable as a nuisance; upon such an indictment, however, the officers would not be liable to punishment *individually*; where the legislature make them thus liable, they can mean nothing else, but that they are to be *personally* liable.



2. It is objected that the defendants are indicted under two acts as the officers of two distinct companies. This is so, but it is no ground of error; the counts are good in form, and the defendants are liable only as officers of "The Mohawk Turnpike Company." There is no such company nominally as the one described in the first count; but if there is one good count, my impression is, judgment cannot be arrested, nor would the indictment be quashed on demurrer. It is a mistake, I think, to say that the defendants were indicted *as directors*. They were indicted as *individuals*, and the facts charged being found to be true, they are to be punished as individuals, the law adjudging them guilty of a misdemeanor.

3. It is said that the act of 1805 does not continue the *individual* liability of the officers. The liability imposed by the act of 1800 is not repealed, and the only effect of the act of 1805 is to create "the bridge company" out of the stock of the old company; the provisions of the first act remain, and as the liability is *individual*, I can see no reason why the prosecution may not be against *each* separately. If it is joint, one may be acquitted and another convicted. Although the offence may be joint, it is several also, and therefore it is no objection that others, joined in the same indictment, have been acquitted. For aught we know the other defendants may have shewn that they endeavored in the board of directors to have the road repaired, but were overruled by the defendant, who is convicted, with the aid of other members of the board.

4. It is said the judgment should have been *that the road be repaired*. It must be remembered that the offence is made by statute a mis-demeanor, and according to my reading of it, the offence is personal. It must, therefore, be punished like other misdemeanors by fine and imprisonment, both or either at the discretion of the court.

Judgment affirmed.

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Beach  
v.  
Chamberlain.

BEACH VS. CHAMBERLAIN and others.

Where a court of common pleas refuse to exercise a discretion vested in them by law, under the impression that they possess not the power which they are called upon to exercise, and in consequence a judgment is erroneously obtained, such judgment will be reversed for error.

**ERROR** from the Seneca common pleas. Beach sued Chamberlain, a constable, and the others his sureties, before a justice of the peace for a liability incurred by Chamberlain as a constable, in relation to an execution issued on a judgment in favor of Beach against three persons of the names of Knox, Scutt and Stark, and obtained judgment. The defendants appealed to the Seneca common pleas. On the trial in the common pleas it was discovered, that in the return of the justice, the name of *Stark* in setting for the original judgment was omitted. The common pleas permitted the plaintiff to withdraw a juror. On the next day the plaintiff, on notice, applied to the court to have the return amended, which was refused, the court being of opinion that they had *not* the power to grant the amendment; and then, on the suggestion of the court that they erroneously had permitted a juror to be withdrawn, without the consent of the defendants, another jury was empanelled on the motion of the defendants, and the plaintiff offering no evidence, a verdict was rendered for the defendants under the direction of the court, on which judgment was rendered.

At the last February term, the plaintiff in error applied to this court for a *mandamus* to correct the proceedings in the common pleas, which application was refused on the ground of delay in making the application, (2 Wendell, 264,) and the cause now came before the court on a bill of exceptions, brought up by writ of error.

*S. Birdsall*, for plaintiff in error.

*Tyler & Bascom*, for defendants.

*By the Court*, MARCY, J. The permission to withdraw a juror, or the allowance of the amendment asked for in this case was a matter resting in the sound discretion of the court, and if the court had so understood their powers and in the

exercise of their discretion had refused the plaintiff's applications, this court would not interfere; but it seems from the bill of exceptions that the defendants were permitted to bring on the trial after the juror was withdrawn, and the motion to amend was denied upon the express grounds that the court could not legally allow of the amendment, and that they had mistaken their power in permitting the juror to be withdrawn.

They did not consult their discretion in refusing the motion to amend, and erred in supposing they had no discretion to exercise. The case is still clearer in relation to the withdrawing of the juror. When the court supposed they had a discretion, they not only permitted him to be withdrawn, but suggested that course to the plaintiff. They countervailed all that they had done for the plaintiff on this subject, not because it had been indiscreetly done, but because it had been done, as they supposed, without lawful authority. I think the judgment in this case ought to be reversed, not for the error of the court in the exercise of their discretion, but for the error of deciding that they had no discretion to exercise.

Judgment reversed, and a venire de novo.

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HARMON *vs.* DURHAM, administrator, &c.

DEMURRER to rejoinder. The declaration is for goods, wares and merchandize sold the intestate in his life time. It also contains the common money counts. The defendant interposes several pleas; amongst others a plea of *plene administravit præter*, \$50, and setting forth a balance of \$600 due and owing on a contract entered into by the intestate in his life time, *under seal*, with Wilhelm Willinck and others, to pay and satisfy which the goods, &c. in the hands of the defendant unadministered are insufficient, &c. The plaintiff replies that *puis darrein continuance*, viz. on the 12th May, He cannot thus benefit the *heirs* seeking an enforcement of the contract, at the expense of the *creditors* of the intestate.

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Harmon  
v.  
Durham.

An administrator cannot retain money remaining in his hands unadministered, to apply on a contract made for the sale of land to the intestate, where the contract has been annulled and cancelled by the vendors.

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1827, the contract set forth in the plea was cancelled and annulled by Willinck and his associates, wherefore he prays judgment, &c. The defendant *rejoins* that the contract set forth in the plea contains a covenant on the part of Willinck and his associates to convey to the intestate, or to his heirs and assigns, a lot of land containing 81 acres, on payment of the price stipulated for the land; that the intestate, at the date of the contract, paid on account of the same \$55, and went into possession of the land with the consent of the vendors; that the intestate died in possession, leaving children his heirs at law, who insist upon having the contract performed, and that the personal estate of the intestate shall be applied towards payment of the price of the land; that if the contract has been cancelled by the vendors, it hath been done without the consent of the defendant and of the heirs; and that he, the defendant, as such administrator, is now in possession of the land, &c. and this, &c. wherefore, &c. The plaintiff demurs, and the defendant joins in demurrer.

*G. W. Lay, & P. L. Tracy*, for plaintiff.

*D. H. Chandler*, for defendant.

*By the Court*, MARCY, J. Two objections are urged against the rejoinder: 1. That it is a departure from the plea; 2. That the matter set up by it is no answer to the replication.

The rules in relation to a departure in pleading do not, I apprehend, strictly apply to this case. The replication sets up matter happening since the plea, in avoidance of it. The object of the rejoinder is to answer this new matter; and as it has happened since the plea pleaded, it is not reasonable to require the rejoinder in such a case to pursue and fortify the plea as strictly as it must do in the ordinary course of pleading. The objection to the rejoinder as a departure from the plea is not well founded.

The covenants being cancelled and annulled by Willinck and others, no action against the defendant can ever be sustained on them. He does not therefore owe a debt by *specialty* to them. By what authority then can he retain against the claim of the plaintiff?

The principal of law which makes it the duty of an administrator to pay what is due on a contract for land out of the personal estate for the benefit of the heirs, settles nothing as to this case. When the administrator has nothing that he can by law retain, the obligation to pay, on such a contract, no more exists than it would if no assets had ever come to his hands. The heirs of the intestate, and not the administrator, had an interest in the contract annulled, and it is for them to object to the act of the vendors in annulling it. They doubtless can, if the contract has not become forfeited, compel a specific performance in a court of equity; but it can never be the duty or the right of the administrator, after the covenants are annulled, to retain against the claims of creditors the assets, and apply them to set up a contract for the benefit of the heirs. The question would present itself in an entirely different aspect, if, after the payment of the debts of the intestate, there was enough left of the personal effects to discharge what was due on the contract at the time of its cancelment by the vendors.

Judgment for plaintiff on demurrer, with leave to defendant to amend.

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Utica Ins. Co.

v.  
Kip.

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THE UTICA INSURANCE COMPANY vs. KIP.

MOTION to set aside report of referees. The plaintiffs declared on a promissory note for \$3000, bearing date the 26th June, 1818, and payable the 4th September then next. The declaration also contained the common money counts. The defendant pleaded the general issue and the statute of limitations; and gave notice of set-off. The plaintiffs replied a new promise. The cause was heard before referees in October, 1829. The note declared on was produced. On the back of it was an endorsement subscribed by the defendant, engaging to pay the balance due on it on demand, the endorsement bearing date the 25th June, 1824.

A promissory note for the payment of money void in law, so that a suit cannot be maintained upon it, may be used nevertheless as evidence of an acknowledgment of indebtedness to take a case out of the statute of limitations.

On the 8th January, 1817, the plaintiffs discounted a note for the defendant to the amount of \$2800, which note was

ALBANY, payable on the 11th April, 1817, and on which a discount of  
 October, 1829. \$50,64 was taken in advance, (the interest, at the rate of  
 Utica Ins. Co. seven per cent. per annum, amounting to only \$49,64.) This  
 v. note was twice renewed by notes payable in six months each,  
 Kip. on which discounts were taken in advance, (\$200 were added to the original amount by a loan, subsequent to the date of the first note.) The practice in the office of this company in calculating *interest* upon notes discounted was to reckon 90 days as the *fourth* of a year, 30 days as the *twelfth* of a year, and 3 days as the *tenth* of a month. This mode of calculation was adopted by the clerks of the institution, on the suggestion of the secretary of the company, as a short and convenient mode of ascertaining the interest to be charged. The secretary, however, on the hearing before the referees, testified that it had not occurred to him that such mode of calculation produced more than *seven* per cent. per annum, or that the company were receiving more than *seven* per cent. interest on the loans made by them. It also appeared that the defendant, who had been one of the directors and president of the company from the commencement of its operations in 1810 until 1824, on the trial of a cause between the plaintiffs and one of its debtors, had, previous to the hearing of this cause, testified that he believed the practice had been in the company to reckon thirty days to a month in the calculating of interest; that no direction, however, had been given by the board as to the mode in which interest should be computed; that the board did not know what amount was taken, either generally or in any particular case; that it was the intention of the board to take legal interest and no more; that the board never knew that they had in any case taken more than legal interest; and that if they ever did take more than legal interest, it was contrary to their intention and in utter ignorance of the fact; that it was not by design, but by mistake.

The plaintiffs also claimed to recover, besides the balance due on the note, the sum of \$5,500 advanced the defendant in the winter of 1816, '17. It appeared that the company were apprehensive that the legislature would do something

hostile to their banking powers at the session of 1816, '17, a resolution having been adopted requiring the attorney general to institute proceedings against the company. The defendant said that he thought that with that sum he could ward off or prevent any acts of hostile legislation. The money was accordingly paid to him, to shield the company from any legislative enactments injurious to them; and it was understood that the defendant should never be called upon to explain how he expened the money. This transaction was between the secretary of the company and the defendant. It was consequently communicated to the board in August, 1817, and the defendant was never called upon to account for the money thus paid him. This claim was rejected by the referees.

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The defendant set up a claim for services rendered by him as president of the company, and also for the amount of forty shares of stock of the company belonging to him, appropriated by the company. In relation to the claim for services, it appeared that a resolution was passed by the board in October, 1816, allowing the sum of \$800 to the defendant for his services as president *during the first year* of their business, and that the principal business done by him as president was during that year. As to the claim for the shares of stock, it appeared that they were forfeited, agreeable to the charter of the company, for the non-payment of a call in 1824. These claims were also rejected.

The referees reported in favor of the plaintiffs \$1729,02, the balance claimed to be due on the note. A motion was now made by the defendant to set aside the report.

*C. P. Kirkland*, for defendant. Taking an excess of interest beyond the rate established by law, under a rule voluntarily adopted by a monied institution, is sufficient evidence of a corrupt agreement to avoid a note, for usury. (2 Cowen, 678, 766.) The note also is void, being taken in violation of the restraining act, the plaintiffs not having banking powers. If the note be *void*, the plaintiffs cannot recover on the money counts under the contract of loan, their claim being bared by

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the statute of limitations. The plaintiffs cannot avail themselves of the indorsement on the note in which the defendant promises to pay the balance which should be found due upon it, because it is in fact but a new security for the debt as distinguished from the contract of loan. If the note be void, it is as if it were a nullity, and is void for every purpose.

*W. H. Maynard & Greene C. Bronson*, (attorney general) for the plaintiffs. Admitting the taking of an excess beyond the legal rate of interest is evidence of usury, it is but *prima facie* evidence and may be rebutted. Unless there was an *intent* to do an unlawful act the statute has not been violated; it is most clearly shewn that such intent did not exist, as well by the solemn declaration of the defendant himself as by the evidence on the part of the plaintiffs.

If the defence of usury was admissible by a stranger, it should not be allowed to the defendant, who, as a director, was a trustee for others. It is against morality and the principles of public policy that he should be permitted to say when called on for the payment of a debt due to the company, true, the money was lent to me, but I made a corrupt agreement with myself acting as your trustee, and you therefore cannot sustain your action.

The plaintiffs in this case being entitled to recover under the contract of loan, though the security or note should be adjudged void, may avail themselves of such evidence as they can command to substantiate their claim; therefore, though the note be adjudged void, its existence remains and may be used as evidence of the contract of loan. It is an acknowledgment in writing that so much money was lent.

*H. R. Storrs*, in reply. The liabilities of the defendant as a trustee, if any, cannot be objected to the defence he sets up. This is not a suit to account for the trust-funds, the defendant is sued as a debtor. If he has abused his trust, he must be called upon to answer in a different manner and before another tribunal. He is now in a court of law, and entitled to his legal rights.



*By the Court, SAVAGE, Ch. J.* I am inclined to think the note *void*, but not for usury, for by the defendant's own account of the operations of the company, the excess was taken by mistake. In this particular this case is distinguishable from the cases referred to by the defendant's counsel. The taking more than lawful interest, and casting it upon an erroneous principal unexplained, would be evidence of a corrupt agreement ; but here both parties have sworn to a *mistake* ; the inference of law, therefore, is *rebutted* by the oath both of the defendant and of the officer who recommended the erroneous mode of casting interest. The note is void because taken in violation of the restraining act, forbidding incorporated companies from carrying on banking operations, unless expressly authorized by their charter.

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But it has been decided in this cause, (8 Cowen, 20,) that though the *security* be void, the contract of loan is not.

In answer to this view of the case, the defendant relies upon the statute of limitations, and it therefore becomes necessary for the plaintiffs to shew a recognition of the demand within six years or the remedy is gone. The evidence on this point is the indorsement on the back of the note. This is certainly an admission that the debt is unpaid, and though the note is inoperative as a security for the money, is it not an acknowledgment sufficient to take the case out of the statute ? I am inclined to think it is.

The claim of the plaintiffs for the \$5,500 was properly rejected. Independent of the suspicious purpose for which it was paid to the defendant, there is nothing in the facts from which a promise to pay may be implied ; the defendant was to use the money at his discretion, and it was understood that he was never to be called upon to explain how he expended it. The act of the secretary was confirmed by the acquiescence of the board, who, though informed in 1817 of the transaction, have not until now called upon the defendant to account.

The referees also did right in rejecting the claims of the defendant. For the first year of the operations of the company a salary was voted to him as president. It was con-

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fined, however, in its terms to that year. His services afterwards must be considered gratuitous. Unless an express agreement is made, it is understood that the services of the president and directors of monied institutions are gratuitous. The defendant's claim for the shares of stock was shewn to be unfounded, they having been forfeited according to the charter of the company.

I am of opinion that the motion to set aside the report of the referees should be denied.

Motion denied.

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STONE vs. KNOWLTON.

A contract in the alternative to transport fifteen or twenty tons of marble from one place to another must be stated in the declaration according to the terms of it. If stated as an absolute contract for the transportation of twenty tons, and not fifteen or twenty tons, the variance will be fatal.

So, to allege a consideration for the promise in addition to the true considerations moving thereto not supported by the proof, will be cause of nonsuit.

THIS was an action of assumpsit, tried at the Cayuga circuit in January, 1829, before the Hon. DANIEL MOSELY, one of the circuit judges.

The plaintiff declared for that whereas the defendant on, &c. at, &c. in consideration that he (the plaintiff) would pay to the defendant a certain sum of money, to wit, the sum of \$35, and at the special instance and request of the defendant agreed to pay the defendant at a certain rate, to wit, at the rate of three dollars per ton, and such canal toll as should be charged to, and paid by the defendant, for and on account of the transportation of the marble hereinafter mentioned, when the marble hereinafter mentioned should be delivered at Weedsport, in the county of Cayuga, he, the said defendant, undertook and agreed with the plaintiff that he would carry and transport a certain quantity, to wit, *twenty* tons of marble of the said plaintiff from Fort Ann, in the county of Washington, to Weedsport, in the county of Cayuga, and to deliver the same at Weedsport aforesaid. Then followed an averment of the payment of \$35, the breach of the contract, and common conclusion.

The contract proved on the trial was, that the defendant agreed to transport *fifteen or twenty* tons of marble for the plaintiff from Fort Ann, in Washington county, to Weedsport, in the county of Cayuga; and that the plaintiff agreed to pay

the canal toll chargeable on the marble, and three dollars per ton; the plaintiff to pay \$35 down towards the toll, the defendant to keep an account of the toll, and if the \$35 was not enough to pay the toll, the plaintiff to pay the defendant the balance, and if more than enough, the defendant to refund the surplus.

The defendant's counsel moved that the plaintiff be nonsuited for variances between the contract as proved and as set forth in the declaration. The motion for a nonsuit was denied. The plaintiff then gave evidence as to the damages sustained by him, and the jury found a verdict for the plaintiff for \$250; which was now moved to be set aside.

*M. T. Reynolds*, for the defendant.

*J. T. B. Van Vechten*, for the plaintiff.

*By the Court*, MARCY, J. The motion for a nonsuit, I think, was improperly overruled. It seems to be well settled that where the contract is in the alternative, and not so set out in the declaration, the variance is material. In the case of *Penny v. Porter*, (2 East, 2,) where the contract for the delivery of one hundred bags of wheat, *forty or fifty* to be delivered at a particular time, at the option of the defendant, and the defendant afterwards elected to deliver *forty*, was declared on as a contract for the absolute delivery of forty bags, the variance was held to be fatal. The case of *Tate v. Whellings*, (3 T. R. 531,) is also an authority to show that this variance is material.

Another variance insisted on by the defendant is still more substantial and manifest. The declaration states that in consideration of thirty five dollars to be paid by the plaintiff, and the agreement of the plaintiff to pay the defendant three dollars per ton, and such canal toll as should be charged to the defendant, the defendant agreed to transport twenty tons of marble from Fort Ann to Weedsport. The agreement proved was to transport twenty tons for three dollars per ton and the tolls, and that the thirty five dollars should be advanced toward the tolls. From the declaration it appears that the thirty five dollars were paid as a part consideration

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for the service to be performed, and beyond the tolls and three dollars per ton; whereas by the proof it is shewn that the thirty five dollars were only an advance towards the toll.

Motion for a new trial granted.

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LEGGETT and WOOSTER vs. BOYD, impleaded, &c.

The wife of the *special bail* is an incompetent witness for the defendant.

The defendant has a right to avail himself of the testimony of *special bail* by substituting and justifying new bail.

*It seems*, that a party has a right to call and examine witnesses who have arrived in court, after the proofs are closed and before the opposite party has summed up the cause to the jury.

The granting or refusing the delay of a trial until a party can obtain the attendance of witnesses casually or unexpectedly absent, will be left to the discretion of the circuit judge.

THIS was an action of assumpsit, tried at the New-York circuit in April, 1828, before the Hon. OGDEN EDWARDS, one of the circuit judges.

The action was on a promissory note for the sum of \$1265,67, bearing date the 12th September, 1825, given by the defendant Boyd, a partner of a mercantile house trading under the name of Boyd and Frost. Boyd only was taken, and he interposed the defence of *infancy*. The mother of the defendant was offered as a witness to prove his *infancy*. She was objected to as incompetent because her husband was *special bail* in the cause. The defendant offered to substitute other bail and to justify *instantly*, which the judge refused to permit, saying the application was addressed to his sound discretion, and that he would not grant it in favor of such a defence. A brother of the defendant, between 18 and 19 years of age, then testified that he always understood and believed the defendant to be 2 years and 11 months older than himself, (according to which the defendant, at the date of the note, was of the age of only 18 years 10 months and 3 days.) Another witness testified that in 1819 the defendant came to live with him as a clerk; he then believed him to be 14, 15 or 16 years of age, probably something like 15; that he lived with him 5 years; that he served as a clerk with another person about 6 months, and then commenced business in partnership with Frost. When defendant left witness, he thought he was not quite of age, but would soon become so. The defendant offered to prove by his brother the family bible of his parents, in which the

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births of their children were entered by their mother, the birth of the defendant being entered as of the 16th November, 1806. This evidence was objected to and rejected. The defendant, stating himself surprised by the objection taken to the competency of the mother of the defendant as a witness, applied to the judge to grant a delay of a few minutes until he could send for witnesses residing in a street not far off. The plaintiff's counsel objected to the delay, as the trial of the cause had already been put off during the circuit, to give the defendant an opportunity to collect his witnesses. The judge observed that this also was an application to the sound discretion of the court, and that in favor of such a defence he should not grant the application under the circumstances of the case. The counsel for the defendant then addressed the jury; and as the counsel for the plaintiff rose to address them, the defendant's counsel stated to the judge that two witnesses who had been expected to attend the trial were then in court, by whom the infancy of the defendant at the date of the note could be proved, and asked leave to examine them. The plaintiff's counsel objected, and the judge again stated that this application was also addressed to the sound discretion of the court, and that under the circumstances which had been disclosed, he did not deem it proper to grant the application. The judge charged the jury that infancy was a defence to the note in question, but that it ought to be established in a satisfactory manner; that if the jury believed, from the testimony which had been given, that the defendant was under the age of 21 at the date of the note, the verdict should be for him, otherwise for the plaintiff. The jury found for the plaintiff. The defendant having excepted to the several decisions made against him, the cause now came before the court on a bill of exceptions.

*J. L. Wendell*, for defendant. It is the settled practice at *nisi prius* to allow a substitution of special bail, where the defendant is under the necessity of calling his bail as a witness. (8 Johns. R. 407.)

The family bible was admissible in evidence under the circumstances of the case. The persons who could have testi-

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fied with absolute certainty had been excluded, and no greater evidence was behind in the party's possession. (1 Philip's Ev. 176.)

A delay for a few minutes to send for witnesses should have been granted in the exercise of a legal discretion, although the defence was so very unmeritorious.

The party should have been permitted to examine his witnesses, although the proofs had been closed. No possible evil could have arisen from it; it was not the re-examination of a witness to supply defects pointed out by the opposite counsel or by the court; it was the examination of witnesses who had just arrived, and for whose arrival a delay had been solicited. (2 Johns. Cas. 318. 7 Johns. R. 306. 4 Cowen, 451.)

The charge to the jury is exceptionable. An intimation from a judge equally calculated with a misdirection to mislead a jury, is good cause to set aside a verdict.

*Fessenden*, for plaintiff. Special bail cannot be a witness for a defendant, and of course the wife of the bail was incompetent. Substitution should not be allowed at the circuit, as insufficient bail may thus be imposed on the plaintiff. Their justification is no security; for the plaintiff may be ignorant of their responsibility, and has no opportunity for inquiry, as he has when bail is regularly put in. At all events, the application to substitute bail is addressed to the discretion of the circuit judge, with the exercise of which upon this point and the other points addressed to the same discretion, this court will not interfere. The family bible was totally inadmissible. (Phil. on. Ev. 188. 4 Barn. & Ald. 53. Cowp. 591.)

*By the Court*, MARCY. J. It is well settled that special bail are so far interested that they cannot be examined as witnesses for a defendant. If in this case the defendant's father was an incompetent witness by reason of his being special bail, his mother was in like manner interested. Where the husband is disqualified by reason of his interest, the wife is also incompetent. (1 Ld. Raym. 744. 2 Str. 1095.)

After the trial of a cause has been commenced, it is entirely in the discretion of the court to delay until a party can pro-

cure the attendance of a witness who is casually and unexpectedly absent at the moment he is called ; and it is scarcely possible to conceive a case where this court would interfere with the decision of a circuit judge on such an application. At all events, I see nothing objectionable in the refusal of the judge in this case to delay the trial until the defendant could procure the attendance of his absent witnesses.

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Entries in a family bible are unquestionably evidence for some purposes, particularly in cases of pedigree, and where the facts transpired at such a remote period that no living witnesses can be supposed to have any knowledge of them. The family bible was not, however, offered in this case to prove any such facts. The entries in it were comparatively recent, and the person by whom they were made was in court. I am disposed to believe the judge decided correctly in rejecting this evidence.

I do not discover any thing objectionable in the charge to the jury. The judge gave no opinion upon the facts ; nor was his charge calculated to mislead them.

I think, however, the judge erred in refusing to permit the party to substitute new special bail, so as to restore the competency of Mary Boyd, the wife of the special bail. This is frequently done on trials where the defendant offers new bail who are willing and able to justify ; and I discover nothing in this case that calls upon us to make it an exception. In the case of *Irwin v. Caryell*, (8 Johns. R. 407,) the court reversed the judgment of a justice of the peace because he refused to release the bail and take other security, the bail being a material witness for his principal. It would be difficult to distinguish that case from this in principle.

It appears to me that the request of the defendant to examine his witnesses who came into court about the time the plaintiff's counsel began to address the jury, was reasonable, and that the judge ought to have heard their testimony ; but whether we would grant a new trial if this was the only question in the case, is a matter of some doubt.

New trial granted.

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Lovett
v.
Adams.

LOVETT and BOWNE vs. ADAMS and others.

A *co-obligor* not sued is a competent witness to prove the terms and conditions on which a *joint* and *several* bond has been executed, where the suit is commenced against only some of the obligors.

A bond executed by *nine* persons as obligors upon certain terms and conditions and subsequently delivered by *five* of the obligors without the knowledge or consent of the remaining *four* upon terms and conditions different from those originally stipulated, is not obligatory upon the latter.

THIS was an action of debt, tried at the Wayne circuit in June, 1828, before the Hon. ENOS T. THROOP, then one of the circuit judges.

The declaration was on a joint and several bond, executed by *nine* persons, bearing date 21st September, 1824, conditioned for the payment of \$8000. *Four* of the obligors only appeared to have been sued. On the trial of the cause the defendants offered to prove that the bond was executed by them as *sureties* for a loan which the Montezuma Turnpike and Bridge Company were negotiating to obtain from the plaintiffs; that the bond was executed at Lyons, in the county of Wayne, and sent to New-York *to be delivered* to the plaintiffs on certain terms and conditions, by which the obligors intended to be indemnified for having become bound for the payment of the money; that the plaintiffs refused to receive the bond on the terms and conditions proposed; that subsequently, on the 29th October, 1824, *five* of the obligors, but not those sued in this action, without the knowledge or consent of the defendants in this action, having made a new and different arrangement with the plaintiffs, by which the security relied on by the defendants for their indemnity was yielded up, delivered the bond to the plaintiffs. To prove these facts, Squire Monroe, one of the five obligors who was not sued in this action, was called as a witness by the defendants. He was objected to as incompetent and the objection sustained. Asher Tyler, another witness offered by the defendants to prove the facts relied on, was also rejected, on the ground that he was a legatee under the will of Comfort Tyler, one other of the five obligors who had signed the bond. Evidence in support of the defence was given, but as the case turns upon the rejection of those witnesses it is unnecessary to be stated. The jury, under the direction of the judge, found a verdict for the plaintiffs, which was moved to be set aside.

W. H. Adams & J. A. Spencer, for defendants.

D. Kellogg, for plaintiffs.

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By the Court, SAVAGE, Ch. J. The defence was, that the bond on which this suit was brought was never delivered by the defendants, which fact was offered to be proved by a *co-obligor*, as to whose execution of the bond there was no dispute. The witness offered was rejected on the ground of interest. How was he interested? If he testified to the facts which the defendants offered to prove by him he could not be benefitted by it, but rather injured. If the bond is valid against the *nine* obligors, he must pay one ninth part of it; if but *five* executed the bond, and the witness was one of the five, his liability would be increased in nearly a two fold ratio. His interest would prompt him to sustain the bond. There is, therefore, no objection to his competency on the ground of interest. Neither could the verdict in this case for or against the defendants, benefit the witness in a suit against himself. A verdict for the defendants would prove that these four defendants never executed the bond; but that would by no means prove that the witness did or did not execute it. I am of opinion, therefore that both Squire Monroe and Asher Tyler were competent witnesses.

It was also proper to shew that the condition on which this bond had been signed was rejected by the plaintiffs or their agent, and that an entire new contract of loan had been entered into between the plaintiffs by their agent and the five obligors who are not defendants in this cause. If a bond be signed, and put into the hands of the obligee or a third person on the condition that it shall become obligatory upon the performance of some act by the obligee or any other person, the paper signed does not become the bond of the party signing the same until the condition precedent be performed. Until then there is no contract. Evidence of such facts should have been admitted.

I am of opinion, therefore, that a new trial must be granted, costs, to abide the event.

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Cumpston  
v.  
Field.

CUMPTON, administrator, &c. vs. FIELD and BRACKET.

A second *fi-  
eri facias* can-  
not issue, until  
after the re-  
turn of a pre-  
vious execu-  
tion.

DEMURRER to replication. The *declaration* was on a *scire facias quare executionem non* on a judgment obtained by the intestate against the defendants for \$1843,54 in *assumpsit*. The defendants *pleaded*, that in the life time of the intestate a writ of *fiери facias* was issued upon the judgment obtained against them, directed and delivered to the sheriff of Onondaga, who, by virtue of the same, levied upon the property of the defendants to a large amount, to wit, to the amount of \$5000, and subsequently sold the same to the full amount due on the execution; and averred that the sheriff had not made any return upon the execution, concluding with a verification and prayer of judgment. The plaintiff *replied*, that he ought not to be precluded from having his execution, because the sheriff of Onondaga did not *sell* the property alleged to have been levied upon for the full amount due on the execution. The defendants *demurred*, and the plaintiff joined.

*I. R. Lawrence*, for defendants, cited Bacon's Abr. 107, 124, 720, tit. Execution; 2 Mod. 214; 2 Wilson, 82; 1 Salk. 318; 6 Taunton, 370; 1 Archbold's Pr. 270; 2 Ld. Raym. 1072; 4 Cowen, 417; 7 id. 13.

*W. H. Seward*, The return of the previous execution was not necessary. This court refused to set aside a *habere facias possessionem* because a previous writ of possession was not returned. (9 Johns. R. 391.) Issue is taken by the replication upon the only material allegation in the plea, viz. the sale of the property to the full amount of the execution.

*By the Court*, MARCY, J. The plea is perhaps liable to the objection of duplicity; but this objection can be taken advantage of only by special demurrer. (1 Saund. 337, n. 3. 1 Chit. Pl. 513.) The plaintiff has seen fit to waive this advantage and to reply. To his replication there is a demurrer upon the ground that it does not traverse all the mate-

rial facts contained in the plea. It is contended that the plaintiff cannot have execution until the former execution is returned. If this be so the demurrer is well taken. A seizure and sale under the execution, issued in the life time of the intestate, is admitted by the replication, and the allegation that the execution has never been returned is not denied. The plaintiff in replying only traverses and denies the allegation that the whole amount of the judgment was levied by the sale.

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The seizure and sale being admitted, a second execution cannot regularly be issued till the former is returned. The second writ must recite the first and the return of the sheriff thereon. (2 Wilson, 82. 1 Salk. 316. 6 Taunt. 370. 1 Arch. Pr. 270.) In the case of *Jackson, ex dem. Thompson, v. Stiles*, (9 Johns. R. 391,) the court, on special application, and, it is to be presumed, for good cause shewn, permitted the plaintiff to have a second *habere facias possessionem*, the first not having been returned. It is evident that the party had not obtained the object sought by the first writ. A difference exists between a writ of possession and a *feri facias*. The former directs a specific act, and if several such writs were to issue on the same judgment it could work no inconvenience to the defendant. All that could be done, whether there were one or more writs, would be to dispossess him and deliver to the plaintiff the identical premises recovered. Such would not be the case where several writs of *feri facias* against the property of the defendant were issued; for thus several satisfactions for the same debt might be obtained. It is necessary that the court should see what had been done on the first writ to enable them to give proper directions on the second.

It is no doubt true, as the plaintiff contends, that where there are several facts set forth in a plea, all going to constitute a defence, his replication would be good if he traversed any one of these facts, without which the defence would be incomplete: but if any fact, not traversed, constitutes a defence, his replication is bad. Such is the character of the replication in this case, if it is true that the first writ must be

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returned before the second can issue. If the fact put in issue by the plaintiff, that the property seized on the first execution did not sell for enough to satisfy the judgment, should be found for him, yet I hold that he is not entitled to another execution till it appear what has been done on the first.

Judgment for defendant on demurer, with leave to plaintiff to amend on payment of costs.

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TAYLOR vs. STRONG and BLANCHARD.

A constable may *ex officio* and without warrant arrest a breaker of the peace, and bring him before a justice. *It seems, however, that this should be done within a reasonable time after the affray.*

THIS was an action for false imprisonment, tried at the Oneida circuit in October, 1828, before the Hon. NATHAN WILLIAMS, one of the circuit judges.

Strong, as a constable, arrested the plaintiff on an execution against him in favor of one Balis. The plaintiff beat Strong with a pole; Strong commanded Blanchard to assist him, who did so; but after a considerable scuffle the plaintiff made his escape, and proceeded to the store of the plaintiff in the execution, which was near by, when he paid the amount of the execution, Strong having followed the plaintiff in this suit to the store. On his way there, however, he called at the office of a justice, entered a complaint on oath against the plaintiff for the assault made on him, and demanded a warrant. After the plaintiff had settled the execution, Strong asked him to drink with him; he said he would not drink with such a set of rascals, left the store and went to a tavern. About 10 or 15 minutes afterwards, Strong again arrested the plaintiff, saying to him that he was not gone yet, that he was his prisoner. The plaintiff again beat Strong, who again commanded Blanchard to assist him. Another scuffle ensued; but the plaintiff was taken to the office of the justice to whom application had been made for the warrant. The justice met the parties at the door of his office, and delivered the warrant to Strong.

Upon this state of facts, the judge intimated that he would charge the jury that Strong, being a constable, had the right to arrest the plaintiff for the affray and assault that had been

committed ; that whatever doubt there might be in the case on account of the discontinuance of the affray before the arrest, yet he was inclined to the opinion, and should so instruct the jury, that the arrest being made by the constable after having made complaint on oath before the justice, and while the justice was making out the warrant, the constable was justified in making the arrest, and the other defendant was justified in aiding and assisting him. Upon this intimation, the plaintiff submitted to a nonsuit, with leave to apply to set the same aside. A motion was now accordingly made.

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*J. A. Spencer*, for plaintiff.

*H. R. Storrs*, for defendants.

*By the Court*, MARCY, J. It is not pretended that the constable Strong, had any precept which authorized him to make the arrest in the street, for which this action is brought ; but it is attempted to be justified on the ground that Taylor, in resisting the officer when attempting to arrest him on the execution, beating him, and exciting the affray which took place there, had committed a breach of the peace ; and having done it in presence of the constable, who is *ex officio* a conservator of the peace, he had a right, and it was his duty, as a constable, to arrest him without a warrant ; and if he had that right, Blanchard, the other defendant, was bound to yield his aid when commanded by the constable. If Strong was justified in what he did, Blanchard is so as a matter of course.

Lord *Bacon* says, that " The office of constable was to arrest the parties that had been breaking the peace, or were in a fury ready to break the peace ; or was truly informed by others, or by their own confession, that they had freshly broken the peace ; which persons he might imprison in the stocks, or in his own house, as his or their quality required, until they had become bounden with sureties to keep the peace." He further observes, that " Constables could not arrest any, nor make any put in bond, upon complaint of threatening only, except they had seen them break the peace, or had come freshly after the peace was broken." (4 *Bacon's Works*,

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84.) Lord Ch. J. *Hale* also says, "A constable may *ex officio* arrest a breaker of the peace in his view, and keep him in his house or in the stocks till he can bring him before a justice of the peace." (1 *Hale's P. C.* 587.) It is also stated by *Hawkins*, that a constable has authority not only to arrest those whom he shall see actually engaged in an affray, but also to detain them till they find sureties of the peace. (*Hawk. P. C. b. 2, ch. 13, s. 8. Also, b. 1, ch. 63, s. 14, 17.*)

It is quite clear, from these authorities, that the power with which the constable is invested is not merely to put an end to the affray, but he is to make the arrest as the means of procuring surety of the offender to keep the peace. To do this, he must be allowed a reasonable time and a fit opportunity. There is room for doubt in this case whether the constable had not delayed too long; but still I cannot say that the charge which the judge proposed to give to the jury was not substantially correct. I am therefore inclined to the opinion that the nonsuit ought not to be set aside.

Motion to set aside nonsuit denied.

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FROST vs. HILL.

A memorandum kept by a clerk of a vendor who sells goods at auction of the articles sold and the prices bid for them, is a sufficient note in writing to bind the vendee.

The assent of the sheriff to the sale by the defendant of goods levied upon by execution, will not divest the title of a purchaser under a previous sale made by the defendant.

ERROR from the Livingston common pleas. The household furniture of one *Pierce* was levied upon by a deputy of the sheriff of Livingston by virtue of two executions amounting together to the sum of \$143,26. The levy was made on the 15th January, 1827; and the defendant in the execution was permitted to remain in possession of the property levied on. The executions were returnable in ninety days, being issued on justice's judgments. On the 7th and 8th days of February, *Pierce*, the defendant, against whom the executions had issued, made a sale of his household furniture at auction, and *Hill*, the plaintiff below, bought sundry articles amounting

A vendor of personal property, is liable to both parties on his warranty of title, is a competent witness for either, his interest being neutralized.

to the sum of \$137,29. A memorandum of the purchases made by Hill was made by a person who acted as the clerk of Pierce at the sale, and kept a memorandum of the articles sold, and the prices at which they sold. He was authorised to shew the property and to deliver it to bidders; and after the sale, the several articles purchased by Hill were marked by him and Hill with Hill's initials. It was agreed between Pierce and Hill, at the time of the sale, that the bids made by Hill should apply towards a debt of about \$134 owing by Pierce to Hill. During the sale, the deputy sheriff who had made the levy on the property of Pierce twice gave notice of the levy and forbade the sale. The property purchased by Hill was left in the house of Pierce. Four or five days afterwards, it was agreed between Pierce and the deputy sheriff and Frost, the defendant below, that Pierce should sell to Frost seventy or eighty dollars worth of the property bid off by Hill at the prices paid by Hill at the auction, and that Frost should pay the amount of the executions. A sale accordingly was made of certain of the property purchased by Hill to the amount agreed upon, for which Frost gave his note to the deputy sheriff, who endorsed the executions satisfied. The property thus purchased by Frost was taken possession of by him, and for the conversion of it an action of trover was brought by Hill.

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On the trial of the cause, Pierce was admitted to testify for the plaintiff below, although objected to as an incompetent witness. The court charged the jury that the sale to Hill at the auction was good and valid within the statute of frauds; and that the sale to Frost was void, the assent of the deputy giving it no validity. The counsel for the defendant excepted. The jury found a verdict for the plaintiff for \$80,25, on which judgment was entered; to reverse which a writ of error was sued out.

*J. Dickson*, for plaintiff in error. Pierce was not a competent witness. The sale to Hill was void within the statute of frauds; the price exceeded \$25; the goods were not received by the purchaser; there was nothing given as earnest to bind the bargain; and there was no note or memorandum

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in writing made and signed by the purchaser. (1 R. L. 79. Roberts on Frauds, 174. 3 Johns. R. 421. 3 Barn. & Ald. 680. 3 id. 321. 2 Barn. & Cress. 37. 2 Black. Comm. 447, 8. 1 Salk. 113.) The memorandum of the sale, being made by the clerk and agent of the vendor, is the same as if made by the vendor, and that is not enough to bind the purchaser. (3 Johns. R. 399.) Validity is given to the entries of an auctioneer or broker, he being considered as acting for both parties. (8 Cowen, 215. 4 Bos. & Pul. 252. 15 East, 103.) The sale to Hill was void also, because the property was in the custody of the law. (18 Johns. R. 311, 363. 17 id. 116.)

*J. A. Spencer*, for defendant. The interest of Pierce was neutralized; he therefore was a competent witness. The person acting as the clerk of Pierce at the auction should be considered as the agent of both parties, and the same validity given to his acts as to those of a broker. (12 Johns. R. 102.) There was a sufficient delivery to have authorized Hill to take the property without incurring the liability of an action by Pierce. There was not only earnest, but a payment in full; it having been agreed that the bids of Hill should apply on Pierce's indebtedness to him. The levy can be set up by no one but the officer, or the plaintiffs in the executions. Pierce having sold the property to Hill, could not subsequently confer title upon Frost.

*By the Court*, SAVAGE, Ch. J. Pierce, as the vendor of the property, warranted the title to both purchasers, and is liable for the value to the losing party; and so far as his interest is concerned it is immaterial which succeeds; his interest is neutralized, and he was therefore a competent witness.

The sale to the plaintiff below was inoperative and void as against the execution, and the sheriff might have sold the property on the execution, but he did not do so. The assent which the sheriff gave to the sale to the defendant below gave no validity to it. The case is to be considered, therefore, as if there was no execution in question. In this point of view, the sale at auction, at which Hill was a pur-



chaser, was valid. There was a sufficient memorandum made by the vendor's clerk and agent ; the property was paid for, because, by the agreement of the parties, the bids of the plaintiff below extinguished a portion of the debt which Pierce owed to Hill, and though the property was not removed, it was marked and designated as Hill's. Frost purchased with a knowledge of the facts, and is in no better situation than Pierce would have been had the action been brought against him and as between him and the plaintiff below, there can be no question that the sale was valid.

The judgment below must be affirmed.

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Bissell  
v.  
Hills.

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BISSELL VS. HILLS.

THIS was an action for false imprisonment, tried at the Oneida circuit in October, 1828, before the Hon. NATHAN WILLIAMS, one of the circuit judges.

The false imprisonment complained of, was an arrest in a civil suit on a *warrant* issued by a justice of the peace on 29th August, 1827, against the now plaintiff at the suit of the present defendant and another person. The warrant was issued on the *oath* of the now defendant, that the plaintiffs in that suit would be in danger of losing their demand unless the process against the defendant in the same was by warrant ; the now defendant orally stating the facts and circumstances within his knowledge, shewing the grounds, of the application. The plaintiff insisted that the warrant had improperly issued, inasmuch as no *proof*, within the meaning of the statute, had been exhibited to the justice to authorize the issuing of it. The judge nonsuited the plaintiff. A motion was now made to set aside the nonsuit.

Under the justice's act of 1824, the *oath* of the party applying for a warrant is *proof* within the meaning of the statute, whereon the necessity and propriety of issuing a *warrant* may be determined.

And it seems that under the *Revised Statutes* the affidavit of the party applying for a warrant would be held sufficient.

*T. Jenkins*, for defendant.

*S. Beardsley*, for plaintiff.

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*By the Court,* MARCY, J. The only question presented by the bill of exceptions in this case is, whether a party, applying in his own behalf for a warrant under the fifth section of the *act for the better and more speedy recovery of debts of the value of fifty dollars*, (Statutes, vol. 6, 281, c. passed in 1824,) can make, by his own oath alone, the satisfactory proof therein required, that the defendant is about to depart from the county, or that the plaintiff will be in danger of losing his demand unless the process be by warrant.

It is true that this court, in expounding similar expressions in the fourth section of the justices' act of 1808, did decide that the *proof* required, meant legal evidence, and that the party's own oath is not such evidence, (9 Johns. R. 75 ;) but in the case of *Terry v. Fargo*, (10 Johns. R. 114,) the court say that in making the former decision they did not advert to an amendment of that section made in the year 1810, which expressly allows the party applying for a warrant to be examined on oath. The section of the act of 1824, upon which this question arises, embraces both the fourth section of the act of 1808 and the subsequent amendment of it, and must have the same effect united that was given to them when disjoined in the case of *Terry v. Fargo*. The practice, I believe, has been very general, perhaps universal, to take the plaintiff's own statement under oath, upon which the justice determines the necessity and propriety of issuing a warrant. The legislature of 1813, which consolidated these two provisions and that of 1824 which continued them thus consolidated, knew of the construction given to these provisions by the supreme court and the practice of magistrates under it, and by retaining the language unchanged, must be considered as giving their sanction to that construction. The same provision, without any essential variation of language, is retained in the *Revised Statutes*, (vol. 2, p. 229, § 18, 19.) Not only this court, but the legislature in several instances has, as I conceive, considered the oath of the party, proof, which may authorise the justice to issue a warrant, in the cases specified in the fifth section of the act of 1824.

Motion to set aside nonsuit denied.

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## BULLOCK vs. BABCOCK.

Bullock  
v.  
Babcock.

THIS was an action of trespass, assault and battery, tried at the Madison circuit in September, 1828, before the Hon. NATHAN WILLIAMS, one of the circuit judges.

In 1816, the defendant then being about 12 years of age, shooting an arrow from a bow, struck the plaintiff and put out one of his eyes, the plaintiff being then between nine and ten years of age. The plaintiff and defendant were school mates. The boys attending the school were assembled near the school house. One of them had a bow and arrow with which he and the defendant had been shooting at a mark. Some remark was made by the plaintiff, when the defendant said, "I will shoot you," and took the bow and arrow from another boy who then held it. The plaintiff ran into the school house and hid behind a fire board standing before the fire place in the school room. The defendant followed to the door of the school room, and saying, "See me shoot that basket," discharged the arrow. At that moment the plaintiff raised his head above the fire board, and the arrow struck him. There was a basket standing on a desk in the direction that the arrow was aimed. When the arrow was shot, there were a number of boys in the school room. There had been no quarrel between the boys. The plaintiff, however, on entering the school house was frightened and said he was afraid he would be shot. The plaintiff suffered great pain for two months, became blind of one eye, and for five years was disabled from attending school in consequence of the weakness of sight of the other eye. His mother became a widow; and when the plaintiff was able to attend school, her poverty prevented his receiving an ordinary education. The defendant's father was a man of considerable property, but no compensation was ever made for the injury inflicted. This suit was commenced in 1827, within a year after the plaintiff attained his age.

The judge charged the jury that the shooting the arrow in the school room where there were a number of boys as-

*Infants are liable in the same manner as adults for trespass and assault.*

*Where the injury is not the effect of an unavoidable accident, the person by whom it is inflicted is liable to respond in damages to the sufferer.*

*It seems, that an injury might probably be considered an unavoidable accident in the case of infants, which would not be so considered in the case of adults.*

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sembled was an unlawful act; that it appeared to him to have been, at the least, grossly negligent and unjustifiable; and that if the jury thought so, they ought to find a verdict for the plaintiff, with damages. The defendant excepted. The jury found for the plaintiff with \$180 damages, and a motion was now made to set aside the verdict.

*J. A. Spencer*, for the defendant. The shooting of the arrow was not an unlawful act, and the judge erred in so instructing the jury. To sustain the action, it should have been shewn that the injury was intentionally done, or that the defendant was grossly negligent. The exercise of the same discretion and care which would be required of adults is not required of infants. (Bacon's Abr. tit. Infancy, H. Comyn's Dig. Infancy, A.)

*P. Gridley*, for plaintiff. The defendant, though an infant when the injury was inflicted, is liable to this action like an adult. (1 Chitty's Pl. 66. 8 T. R. 366. Bacon's Abr. Infancy, H.) The discretion of an infant is not inquirable into when called on to answer *civiliter*, though it is otherwise where the proceedings against him are *criminaliter*. It was unnecessary to shew the injury was intentional. It was enough that it happened through the negligence of the defendant. (Selwyn's N. P. by Wheaton, Assault & Battery, 19, and cases there cited. 1 Chitty's Pl. 170. 1 Bingham, 213.) The charge of the judge was unexceptionable; for he submitted the case fully to the jury.

*By the Court*, MARCY, J. It is not, I apprehend, necessary for us to say whether the judge erred or not in his remark to the jury that, under the circumstances of the case, the act of the defendant in shooting the arrow in the school room, where there were a number of scholars, was not lawful; for if the act in itself was lawful, and there was not a proper care to guard against consequences injurious to others, the actor must be held responsible for such consequences.

In ordinary cases, if the injury is not the effect of an unavoidable accident, the person by whom it is inflicted is liable

to respond in damages to the sufferer. Where, in shooting at butts, the archer's arrow glanced and struck another, it was holden to be a trespass. (Year Book, 21 H. 7, 28 a.) So where a number of persons were lawfully exercising themselves at arms, one whose gun accidentally went off was held liable in trespass for the injury occasioned by the accident. *Weaver v. Wood*, (Hobart, 134.) In this case the action was assault and battery; and the plea was, that while the parties were skirmishing by order of the lords of the council, by way of military exercise, the defendant *casualiter et per infortunium et contra voluntatem suam* in discharging his musket, did the injury complained of. To this plea there was a demurrer, and judgment was given for the plaintiff. In giving their opinion, the court say, "If two men tilt or tourney in presence of the king, or if masters fence and the one kills the other, or if a lunatic kills a man, it is not *felony*; yet, in trespass, which tends only to give damages according to the hurt or loss, it is not so. Therefore if a lunatic hurt a man, he shall be answerable in damages; and no man shall be excused of a trespass, except it may be adjudged utterly without his fault." Where, in a dark night, the defendant got on the wrong side of the road, and an injury ensued to the person of the plaintiff, trespass for the damage was sustained. (3 East, 593.) It is decided in the case of *Wakeman v. Robinson*, (1 Bing. 213.) if the accident happen entirely without the fault of the defendant, or any blame being imputable to him, an action will not lie. In that case, the blame imputable to the defendant was, that his horse being young and spirited, he used him without a curb rein; that in his alarm, he probably pulled the wrong rein; and that he ought to have continued on in a straight course. The blame fairly imputable to the defendant, it will be perceived, must have been slight indeed, as it certainly was in the case of the injury done by the glancing of the arrow when shooting at a mark, (a lawful act,) and by the accidental discharge of the musket at a training; and yet, in each of these cases, an action for the injury was maintained. Unless a rule is to be applied to this case different from that applicable to a transaction between adults, the proof was most abundant to

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charge the defendant with the consequences of the injury. Infants, in the same manner as adults, are liable for trespass, slander, assault, &c. (Bing. on Infancy, 110. 8 T. R. 335. 16 Mass. Rep. 389. 2 Inst. 328.) Where infants are the actors, that might probably be considered an unavoidable accident which would not be so considered where the actors are adults; but such a distinction, if it exists, does not apply to this case. The liability to answer in damages for trespass does not depend upon the mind or capacity of the actors; for idiots and lunatics, as we see by the case reported in Hobart, are responsible in the action of trespass for injuries inflicted by them. (1 Chit. Pl. 66.)

Motion for new trial denied.

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WORMMOUTH and wife vs. CRAMER and wife.

In *slander* where the words are spoken in a foreign language, the proper mode of declaring is to state the words in the foreign language, and to aver the signification of them in English, and that they were understood by those who heard them.

THIS was an action of slander, tried at the Herkimer circuit in September, 1828, before the Hon. NATHAN WILLIAMS, one of the circuit judges.

The declaration alleged the words to have been spoken by the wife of Cramer, charging the wife of Wormmouth with having stolen a fine lawn cap. The words were set forth in the declaration in the English language. They were proved to have been spoken in the German language. The persons who heard the speaking understood the German language. The counsel for the defendant moved that the plaintiffs be nonsuited, insisting that the words should have been set forth in the declaration in the German language, or it should have been alleged that they were spoken in that language, and that they were understood by those who heard them. The motion was granted, with leave to the plaintiff to apply to set aside the nonsuit, which application was now made.

*M. Hoffman*, for plaintiff. Where the slander is *written*, the words may be set forth in a foreign language; but where it is *oral*, it is often impracticable. I know no case where it has been held that proof of the words in a language different

from that stated in the declaration has been held a variance. A contract stated in a declaration in English, is supported by proof of a contract in another language.

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*L. Ford*, for defendant, cited Cro. Eliz. 865, 496, 645; 3 Maul. & Selw. 110.

*By the Court*, SAVAGE, Ch. J. The rule is, that words proved must be proved as laid; that is, substantially so; and it is not enough to prove words of similar import. How can this rule be complied with when words are laid in one language and proved in another? This is emphatically proving words of similar import. The judge at the circuit was correct in nonsuiting the plaintiff for a variance. The cases cited by the defendant's counsel shew that the proper mode of declaring is to state the words in the foreign language, and to aver the signification of them in English, and that they were, understood by those who heard them. (*Starkie on Slander* 85, 308.) This was done in the case of *Demarest v. Harding*, (6 Cowen, 76,) though no question on that point arose in that case.

Motion to set aside nonsuit denied.

#### WORMMOUTH and wife vs. CRAMER.

THIS was an action of slander, tried at the Herkimer circuit in September, 1828, before the Hon. NATHAN WILLIAMS, one of the circuit judges.

The defendant it seems uttered the same slander in *English* which his wife published in *German*, (ante, p. 394.) The words, as proved, charged the plaintiff's wife with stealing a cap from one Pomeroy's. After the evidence on the part of the plaintiffs was closed, the defendant offered to prove, in mitigation of damages, that before the speaking of the words a cap and a handkerchief had been lost at Pomeroy's

In an action of slander particular facts which might form links in the chain of circumstantial evidence against the plaintiff cannot be received under the general issue in mitigation of damages; and it was accordingly held, that proof that the plaintiff was in possession of the property alleged to have been stolen, and returned it to the owner about the time of the prosecution of another person for the stealing of another article alleged to have been taken at the same time, was inadmissible under the general issue.

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tavern ; that one Caty Kinsman had been charged and prosecuted for stealing the handkerchief, and that about the time of the prosecution against her and previous to the speaking of the words charged, the plaintiffs sent home to Pomeroy's the cap that had been lost ; the counsel for the defendant at the same time admitting that the evidence, if received, would go only in mitigation of damages, and not in justification of the words spoken. This evidence was objected to and rejected. The defendant had pleaded only the general issue ; there was no plea or notice of justification. The defendant excepted to the decision of the judge. The jury found for the plaintiffs \$150 damages. The cause now came before this court on the exception taken, and a new trial was asked for.

*L. Ford*, for defendant. The evidence offered ought to have been received to rebut the inference of malice. (7 Cowen, 633. Starkie on Slander, 410.) It was offered only in mitigation of damages, and could not have operated in justification of the defendant.

*M. Hoffman*, for plaintiffs. If the proof offered was calculated to excite a belief that the plaintiff was guilty of the felony it was inadmissible. Its effect would have been the same as if the defendant had undertaken to justify ; this he could not do under the *general issue*. (14 Johns. R. 232. 5 Cowen, 499. 7 id. 613. 8 id. 214.)

*By the Court*, MARCY, J. What may be offered in mitigation of damages in actions of slander and for libels, was much considered in the case of *Root v. King*, (7 Cowen, 613,) and it seems to be there settled, "that the defendant in such actions, if he has not attempted to justify the charge, may prove under the general issue, by way of excuse, any thing short of a justification which does not necessarily imply the truth of the charge or tend to prove it true, but which repels the presumption of malice." The defendant here offered, with a view to mitigate damages to prove that the plaintiff, Mrs. Wormouth, was in possession of the property alleged



to have been stolen, and that about the time of the prosecution of another person for an article alleged to have been stolen at the same time, she returned it to the owner. Particular facts which might form links in the chain of circumstantial evidence against the plaintiff, cannot be received under the general issue in mitigation of damages. (Starkie on Slander, 410.) The possession of the stolen property which the defendant offered to prove was such a fact, and the judge decided correctly in refusing to receive the evidence.

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New trial denied.

#### A. WARNER vs. PRICE and others.

THIS was an action of *indebitatus assumpsit*, to recover monies alleged to have been paid by the plaintiff for the defendants, tried at the Livingston circuit in October, 1828, before the Hon. JOHN BIRDSALL, then one of the circuit judges.

A promissory note for the sum of \$800, bearing date 19th April, 1826, was signed by Jacob Price, Alfred Jones, Emanuel Case and John Markham, (the defendants in this cause, payable in four months to the president, directors and company of the bank of Ontario, to be discounted by the bank for the accommodation and sole benefit of Price. The bank refused to discount the note, unless further names were obtained to the note. The note was subsequently presented with the additional names of Asahel Warner, (the plaintiff in this cause,) and of Matthew Warner, and was then discounted. To the name of Asahel Warner was added the word *surety*. Matthew Warner testified that he was requested by Price to sign his name to the note as a surety, after the other five drawers had signed the same, and that considering Price, Jones,

Where a promissory note made to be discounted at a bank, for the accommodation and benefit of an individual signed by him and by three other persons as his sureties, is refused to be discounted by the bank, unless further names are procured; and another person is procured by the principal to put his name to the note, when it is discounted, and such person is subsequently compelled to pay a part of it, he cannot recover for mo-

ney paid in a joint action against the principal and the three persons who originally signed as sureties, although he expressly signed the note as *surety*; he will be considered as a *co-surety*, unless a state of facts is shewn from which it appears positively, or by legal intendment, that those who originally signed intended, as to the subsequent signer, to stand in the character of *principals*.

The admission by one of the original sureties, that the plaintiff signed as *surety* for all the makers of the note, will not bind his co-sureties; no *partnership* being shewn to exist between them.

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Case, and Markham good and responsible, he did not hesitate to sign ; Price told him that he was under the necessity of procuring money to go to Albany with a boat.

The note not being paid when due, a suit was commenced upon it, and a judgment obtained against all the makers for the sum of \$863,14. An execution was subsequently issued to the sheriff of Livingston, whereon he was directed to levy the sum of \$343,83 with interest, besides his fees. Of this sum, *Matthew Warner* paid \$176,63. After the payment of that sum, the plaintiff in this suit called on the sheriff for the avowed purpose of paying and settling the execution ; the sheriff gave him the money paid by *Matthew Warner*, and delivered to him the execution, and requested him to pay over the money and settle the execution with the attorney for the plaintiffs. On the same day the plaintiff in this cause returned the execution to the sheriff with a receipt endorsed thereon by the attorney of the plaintiffs in the execution, that he had received of the sheriff the amount of the execution ; whereupon the sheriff gave the plaintiff in this cause a receipt acknowledging that he had received of him \$359,89 in full. The sheriff proved his own receipt : the receipt of the attorney was proved by another witness by evidence of the attorney's hand writing ; which last evidence was objected to, but admitted.

The plaintiff further proved admissions made by *Case*, one of the defendants, that he had said that the plaintiff would not lose any thing, as he had signed as surety for him, *Jones*, *Markham* and *Price* ; and if *Price* was not good for the money, they were. This evidence was objected to, but received. These admissions were made when the other defendants were not present ; there was no partnership or connection in business existing between *Case* and the others defendants. The judgment in favor of the bank was shewn to have been fully paid up. A verdict was taken for the plaintiff for the amount paid by him on the execution, exclusive of what was paid by *Matthew Warner*, and the interest of the same, subject to the opinion of this court.

*A. R. Rann*, for plaintiff, cited Douglass' R. 654 ; 11 East, 577 ; 3 Day, 309 ; 6 Johns. R. 267 ; 2 id. 213 ; 4 id. 460 ; 5 id. 176 ; 2 T. R. 100 ; 1 Pothier, 326 ; 3 T. R. 757 ; 4 id. 177 ; 17 Johns. R. 176 ; 4 Cowen, 573.

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*J. Dickson*, for defendants, cited 2 Equity Cas. Abr. tit. Contribution ; Freeman, 97 n. ; 1 Cox, 318 ; 2 Bos. & Pul. 270 ; 4 Johns. Ch. R. 338, 11 Vesey, 22 ; 2 Comyn on Cont. 186, 7, 8 ; Starkie's Ev. 51, 1272.

*By the Court*, SAVAGE, Ch. J. The first question is, whether the plaintiff was *surety* for all the defendants who preceded him as makers of the note, or for Price only ? What passed between Price and the plaintiff when he subscribed his name does not appear ; but what was said to Matthew Warner was sufficient to apprise him that Price alone was to be benefitted by the money, and when he was asked to become surety, he could not suppose that those who had preceded him stood in any other character than sureties. The note, when presented to the plaintiff, was perfect, and he might have advanced the money upon it, and it would have been a good security in his hands ; but when the fact appears that he signed as surety, and that all the others except Price signed the note as sureties also, they must all be considered co-sureties unless a state of facts be shewn to the court from which it shall appear positively, or by legal intendment, that these defendants intended, as to the subsequent signer, to stand in the character of principals. No inference of that kind can be drawn from the facts in this case, unless it be from the declarations of Case, who admitted that he and the other defendants were liable to the plaintiff ; but whether this admission was founded on the fact of their being all principals, or on a mistaken notion of the rights and liabilities of the parties does not appear. It may have been either. But if he intended to admit that they were all principals, his admission is not evidence to charge the other defendants. An admission of indebtedness, by one of several joint debtors, is sufficient to take a case out of the statute of limitations ; but an admission of one partner, after dissolution of the part-

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nership, cannot effect the other partner to make him chargeable by reason of such admission, with the above exception. It is not pretended that these defendants were partners; the contrary is proved. I am of opinion, therefore, that the action cannot be maintained. If it could, there is evidence of the payment of the money to the sheriff. But the receipt of the plaintiff's attorney was inadmissible; the attorney himself might have been produced.

I am of opinion that the defendants are entitled to judgment.

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WARNER and CARYL vs. BARKER and HALSTEAD.

A demand against a private association of company cannot be set off against a note payable to the agents of such company, and prosecuted by them in their individual names, although the note was taken for the benefit of, and belongs to the company. Nor can a demand belonging to one of two defendants jointly sued be set off against a demand against both defendants.

THIS was an action of assumpsit, tried at the Ontario circuit in January, 1829, before the Hon. NATHAN WILLIAMS, one of the circuit judges.

The plaintiffs and the defendant Barker were members of a private association called the Union Line Stage Company. A post coach, 8 horses and 2 sets of harness were sold by the plaintiffs to the defendant, amounting together to the sum of \$950. A bill of the sale was made out dated 27th March, 1827, on which the defendant was credited the whole amount, comprising in the items of credit two notes of \$235 each, one payable at six, the other at twelve months; and underneath the bill was written an agreement, signed by the plaintiffs, (Warner designated as president, and Caryl as director of the company,) promising, as soon as it could be ascertained what the defendant's stock in the company was worth, to endorse the amount on his note payable in one year from the eighteenth day of April *instant*; and further agreeing that the balance due him, if any, up to the 1st day of April, should also apply on the note. A note was given by Barker, and Halstead as his surety, for the sum of \$235, bearing date 18th April, 1827, payable to the plaintiffs one year after date; for the recovery of which this action was brought.

The defendants claimed to be allowed, as a set-off against the note, a demand against the Union Line Stage Company, purchased by Barker of one Joseph Failing, who held the

certificate of Warner, as president of the board, that there was due to him, from the Union Line Stage Company, \$205, 71. The certificate was obtained on the 10th February, 1827, and shortly afterwards, and previous to the commencement of this suit, it was transferred by Failing to Barker, one of the defendants. Notice of the transfer was given to Warner, who said he would set off the amount of the certificate against Barker's note last payable. The defendants offered to prove by parol, a resolution of the company at one of their meetings, that any debts which should be paid by a stockholder should be allowed by the company against any note they might hold against him; but it appearing that written minutes were kept of the proceedings at the meetings of the company, by a secretary of the company, and such minutes not being produced, or their absence accounted for, the evidence was objected to and rejected. The defendants proved that the plaintiffs were the agents of the company to sell the property and collect the debts of the company. A verdict was taken for the plaintiffs for the amount of the note, subject to the opinion of this court whether the set-off ought to be allowed; and if the same was allowed, the verdict to be modified accordingly. The cause came before the court on a case made.

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*A. R. Dann*, for plaintiffs.

*L. F. Stevens*, for defendants.

*By the Court*, MARCY, J. The point in this case deserving most attention is that which relates to Barker's claim to set off the demand bought by him of Failing against the Union Line Stage Company. When Failing stated to Warner, one of the plaintiffs, that he had transferred his claim against the company to Barker, Warner observed that it should be set off against the note given by Barker last due, that is, the note, as appears satisfactorily by the evidence, on which this suit is brought. This set-off is resisted on the ground that it is not between the parties to the record. The question is fairly presented, whether a set-off can be allowed between parties in interest, but who are not parties on the record?

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The decisions under the English statute of set-off have been extended to parties in interest ; but our statute has provisions not found in the English act, and it has received a different construction. The provision which directs a balance to be certified in favor of the defendant, in case his claim shall exceed that of the plaintiff, has given rise to a difference in the construction of the two statutes.

Where the plaintiff prosecutes a trustee, the defendant, under our statute, cannot set off a demand against the *cestui que trust*. (5 Cowen, 231.) It appears from the case of *Wolfe v. Washburn*, (6 Cowen, 261,) that a demand, to be the subject of a set-off at law, must be between the parties to the suit ; if it be due from the plaintiff and another to one of two defendants, it cannot be set off.

It cannot be pretended, if the demand here offered as a set-off had exceeded the demand claimed by the plaintiffs, that both defendants would have been entitled to the balance. Halsted, one of the defendants, had no interest in the demand offered to be set off ; nor would the plaintiffs have been liable alone for such balance : the demand offered as a set-off was due from the Union Line Stage Company, and not from the plaintiffs, the officers of that company.

The set-off is also claimed on the ground of an agreement to allow it on the demand for which this suit is brought. The parol proof of what was contained relative to this subject in the minutes of the company having been, as I think, properly rejected, the only evidence of the agreement is the declaration of Warner to Failing, that he would allow it to Barker on this demand. This declaration to a third person, who then had no interest in the matter to which it related, and made without any consideration, does not, I apprehend, preclude the plaintiffs from interposing any legal objection to the set-off which would exist but for such declaration. I am therefore of opinion that the claim against the Union Line Stage Company, purchased by Barker of Failing, is not a proper subject of set off against the note for the recovery of which this action was brought.

Judgment for plaintiff.

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v.  
Fuller.

## TAYLOR vs. FULLER and BALIS.

THIS was an action for false imprisonment, tried at the Oneida circuit in October, 1828, before the Hon. NATHAN WILLIAMS, one of the circuit judges.

The false imprisonment complained of was an arrest on a justice's execution issued by Fuller, a justice of the peace, on a judgment confessed before him by the defendant in favor of Balis for \$5.49 on the 23d April, 1828. The execution was issued on the 7th May, 1828, on the application of Balis, he making oath before the justice that he would be in danger of losing his demand unless the execution issued before the expiration of 30 days after the rendition of the judgment. The defendant had not a family, and was not a freeholder. The execution, after reciting the judgment, commanded the constable forthwith to levy on the goods and chattels of the defendant, (except such goods and chattels as are by law exempted,) the amount of the judgment, with interest from the 23d April, 1828, and to bring the money before the justice at his office in Whitestown within 30 days, to render to the plaintiff for his damages and costs; and for want of goods and chattels whereon to levy, commanded the constable to take the body of the defendant and convey him to the keeper of the common jail of the county aforesaid, there to remain until discharged according to law. The plaintiff was arrested on the 13th May, 1828, and taken to the store of the plaintiff in the execution, where he paid the amount. The plaintiff insisted that the execution having been issued before the expiration of 30 days after the rendition of the judgment, had been issued illegally, inasmuch as it was not called for at the rendition of the judgment. The judge decided that the execution might issue at any time upon the proper oath being made. Several other questions were raised at the trial by the plaintiff which were decided against him, but are not noted here, as they were not insisted on in the argument of the case. The plaintiff excepted to the decisions of the judge,

*A justice's execution may be against the goods and person of the party against whom it issues, in the same process, in cases where the party is subject to imprisonment.*

*The oath necessary to enable a party recovering to demand an execution within 30 or 90 days, as the case may be, must be made forthwith, while the parties are still before the justice; so that the party liable to execution may give the security contemplated by the act.*

*An oath is not necessary to justify the issuing of an execution, where the party liable to execution is neither a freeholder nor has a family.*

ALBANY, and was nonsuited; to set aside which nonsuit a motion was  
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*J. A. Spencer*, for plaintiff, insisted that an execution from a justice's court cannot issue against the *person* of a defendant, until an execution against his *goods and chattels* has been returned *nulla bona*; and that to entitle a party to an execution previous to the expiration of the time which must elapse ordinarily before it can issue, the oath authorizing a previous issuing of the execution must be made at the time of the rendition of the judgment.

*H. R. Storrs*, for defendants.

*By the Court*, SAVAGE, Ch. J. The *fourteenth* section of the *fifty dollar act*, (Statutes, vol. 6, p. 286, c.) provides in the first place, that where judgment shall be rendered against either party, execution shall thereupon issue; it then prescribes, 1. the form of the execution, and 2. the time of issuing it.

1. As to the form, it shall be directed to a constable, commanding him to levy the amount of the goods and chattels of the person against whom it has issued, and to bring the money before the justice to render to the party in whose favor it was granted; and if sufficient goods and chattels shall not be found, such execution may be renewed, or further execution may be had, or an action of debt may be brought, and shall *further command* the constable to take the body, &c. It is contended that no execution can legally issue, in the first instance, against the body. This part of the section is not expressed with that clearness and precision which is desirable; but the construction which has universally been given to it is, that the execution shall direct the officer to levy on property, and if none can be found, then it *shall further command* the officer to take the body. If the legislature had intended that the execution against the body should have been a distinct process, they would not have used the words *further command*; this implies a previous command. What is that previous command? Clearly the command to take the property. The obscurity arises from the provision for



further execution, or renewal or the action of debt, being introduced in this section between the first and second parts of the contents of the execution.

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That this is a correct conclusion, will be manifest from a brief review of the laws regulatings proceedings before justices. By the tenth section of the ten pound act of 1787, (2 Jones & Varick's Revision, 159,) the execution commands the constable to levy on the goods and chattels, &c. "and for want of sufficient goods and chattels whereon to levy, to take the body of the person against whom such execution shall be granted," &c. Two years afterwards the law was altered, and it was enacted, (2 J. & V. 417,) that no person having a family, not being a freeholder, should be imprisoned by virtue of a justice's execution, and in such case, the execution should be directed against the goods and chattels alone; and if no goods or chattels should be found, or not sufficient, provision was made for a renewal of the execution, or further execution, or an action of debt; but no execution against the body of such defendant was given.

In the revision by Kent & Radcliff, 1 vol 497, the revisors have incorporated the act of 1789, last referred to, into the 14th section, and immediately after directing that the execution shall be against the goods and chattels, the remedy by renewal, or further execution, or by action of debt is given, and then the further direction follows, that if the party be a freeholder, or have no family, or the judgment be for a violation of the act regulating inns and taverns, "then every execution to be issued as aforesaid may further command, that if sufficient goods and chattels cannot be found to satisfy the debt or damages and costs as aforesaid, that the officer take the body of the person against whom such execution shall be granted," &c. It is not necessary to pursue the annual amendments or rather alterations which were made to this statute. In the next revision by Van Ness & Woodworth, in 1813, (1 R. L. 393,) we find nearly the same phraseology as in the act of 1824, under, which the execution in question was issued. It will be seen that the legislature always contemplated an execution against the goods *and* person in the same process were the party was liable to imprisonment;

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that when imprisonment was abolished in certain cases, the remedy by renewal, further execution and action of debt, were intended as a substitute; when imprisonment was restored, the other remedies were retained, but without proper attention to perspicuity in the arrangement of the different members of the section. It may be further observed, that the constable is directed, for want of goods and chattels, &c. "according to the tenor of the said execution," to take the body, &c. It is clear, therefore, that the execution in this case was conformable to the statute.

2. The second point taken by the plaintiff's counsel may be conceded to be correct, that wherever an oath is *necessary* to enable the party covering to demand an execution within 30 or 90 days, as the case may be, such oath should be made forthwith upon the rendering of such judgment; that is, while the parties are still before the justice, that the party liable to execution may give the security mentioned in the act. But that does not affect this case; the plaintiff here was neither a freeholder, nor had he a family; no oath was necessary, therefore, at any time to justify the issuing an execution. The other points raised upon the bill of exceptions being abandoned upon the argument, require no discussion.

Motion to set aside nonsuit denied.

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TOMKINS vs. HAILE.

The *naked* possession of property for a short time, and the exercise of acts of ownership over it, will not authorize a jury to find a transfer of property where there is no proof of acquiescence or recognition by the former owner of such possession.

This was an action of trover, tried at St. Lawrence circuit in February, 1829, before the Hon. ESEK COWEN, one of the circuit judges. The action was brought for the recovery of damages for the taking of a horse, waggon and harness. The plaintiff proved that he was the owner of the property, and continued in the possession of it, in the county of *Onondaga*,

Where an actual conversation is shewn, a demand and refusal is not necessary in the action of trover.

until the spring of 1827. On the 28th June, 1827, the property was levied on in the county of St. Lawrence, by virtue of a justice's execution, issued on a judgment in favor of the now defendant against one Perry Stevens, in whose possession it was at the time. The levy was made by the direction of the defendant, and he became the purchaser at the sale under the execution and took away the property.

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The defendant offered to prove that Stevens had been in possession of the property ever since he had been in the vicinity where it was sold; that he had used it, and exercised various acts of ownership over it, such as lending it, and offering to exchange and sell it, as evidence of a transfer of the property to Stevens, but no farther evidence was offered. This testimony was objected to and rejected by the judge. The defendant excepted. The jury found for the plaintiff with \$60 damages, and a motion was now made for a new trial.

*L. Hoyt*, for defendant. The defendant having obtained the possession of the property lawfully, by purchase under a judicial sale, no action would lie against him until after a demand and refusal. (6 Johns. R. 44. 2 Cowen, 546.) Possession is *prima facie* evidence of property. To entitle the plaintiff to recover, he should have shewn that Stevens' possession did not conflict with his right.

*J. A. Spencer*, for the plaintiff. The property was shewn to be in the plaintiff, and there was no evidence that he had parted with it. There being an actual conversion, a demand was not necessary. This case is distinguishable from that in 6 Johnson. There the defendant was a naked purchaser at vendue; here the defendant directed the levy.

*By the Court*, MARCY, J. The defendant attempted to shew that Stevens was in fact the owner of the property, by proving that he had possession of it when it was levied on, had loaned it, and offered to sell or exchange it. This evidence would not, I think, have warranted the jury to find that there had been a change of property. How long Ste-

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vens had been in possession does not appear; but it could not have been long. No acquiescence of the plaintiff in the possession of Stevens, nor any recognition of his right to possess it was shewn. We cannot, therefore, say that the judge erred in regarding these facts as amounting to no proof of property in Stevens.

There is scarcely a pretence to question the conversion. The constable acted under the express direction of the defendant in seising and selling the property, and his acts are in law the acts of the defendant. In this respect there is an essential difference between this case and that of *Storm v. Livingston* (6 Johns. R. 44.) The sale here was an actual conversion by the defendant.

Motion for a new trial denied.

#### BANK OF UTICA vs. PHILLIPS.

Notice to an endorser of the non-payment of a note sent to the place where he resided at the time of the discount of the note is sufficient to charge him, although intermediate that time and the maturity of the note he has changed his place of abode.

Inquiry as to the residence of an endorser is not necessary, where the holder has reason to believe that he knows his place of abode.

Interest taken in advance

THIS was an action of assumpsit, tried at the Oneida circuit in April, 1828, before the Hon. NATHAN WILLIAMS, one of the circuit judges.

The defendant was the second endorser of a promissory note for \$300, bearing date the 28th November, 1826, payable 90 days after date, at the Bank of Utica, where the note was discounted on the 2d December, 1826; the interest being taken in advance. When due, the note was protested for non-payment, and notice sent per mail, directed to the defendant at the village of *Geddes*, in the county of Onondaga, where the note purported to have been given, and where the defendant resided when it was discounted. In the month of December, 1826, after the note was discounted, the defendant had removed to the village of *Fulton*, in the county of Oswego, where he has since continued to reside. At the time the note was discounted, it was known to the officers of the bank that the defendant resided at *Geddes*, and a memorandum of his then place of residence was made on

by a banking institution on discounting a note is not usury.

the note, in conformity to the uniform practice of the bank in such cases. When the note fell due, no inquiry was made as to the defendant's residence, the officers of the bank having no knowledge of his removal.

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On this state of facts, the counsel for the defendant insisted that the defendant was entitled to a verdict, because the taking of *interest in advance* was usurious and rendered the note void; and if the note was not void, that the notice of protest was insufficient to charge him as endorser, not being directed to his place of residence; and requested the judge so to charge the jury. The judge ruled that the note was not usurious, and that the notice was sufficient. The defendant excepted. The jury found for the plaintiffs, and the defendant now moved for a new trial.

*J. A. Spencer*, for the defendant, said that in the case of *The Manhattan Company v. Osgood*, (15 Johns. R. 162,) the taking of interest in advance by a banking institution, on the discounting of a note, was held *not* to be usurious; but as he understood the decision made by the *court of errors* in the case of *The Bank of Utica v. Wagar*, (8 Cowen, 398,) the law had been otherwise settled by that court; and if so, the plaintiffs were not entitled to recover in this cause.

*By the Court.* We do not understand such to have been the decision of that court. There is nothing in the report of the case shewing the opinion of the court upon this point. We held, when the case was before us, in conformity to the decision in the case of *The Manhattan Company v. Osgood*, that the taking interest in advance, by a banking institution, on discounting a note, is not usury, and the judgment given by this court is affirmed. What may have been said by one or two members of the court of errors in delivering their opinions is not necessarily the judgment of that court. When a point solemnly and deliberately adjudged by this court is said to be overruled, it must be clearly and unequivocally shewn, or we will consider it our duty to adhere to what we conceive to be the settled law of the land. In this view of the question, we cannot hear an argument upon this point.

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*Spencer.* I have done my duty in presenting the question. On the other point, however, we hope to succeed in obtaining a new trial. Notice of non-payment to charge an endorser must be personal, or sent to the place of his residence. The holders were bound to make inquiry when the note fell due, not when it was discounted. (13 Johns. R. 432. 1 id. 294.) No inquiry was made. Had it been made, most probably the necessary information would have been obtained.

*G. C. Bronson*, (attorney general,) for the plaintiffs. All that ordinary diligence and prudence could require to bring notice home to the endorser was done in this case. The note being dated at Geddes, in the absence of other proof, the presumption is, that Geddes was the residence of the endorser. It was in fact his residence when the note was discounted, and so known to the officers of the bank. There is no pretence that they knew of his change of residence. Why then should they institute an inquiry as to the place of his abode? It is owing to the act of the defendant himself that the notice was not directed to his place of residence, and the holders ought not therefore to be injured. He commented upon the cases cited on the other side, and urged that in each of them much stress was laid upon the *place* named in the body of the instrument as a guide for the direction of the notice. He also particularly invited the attention of the court to the case of *Stewart v. Eden*, (2 Caines, 121.)

*By the Court*, MARCY, J. Was the notice, under the circumstances of this case, sufficient to charge the defendant? It appears to me that the question of diligence cannot arise except in cases where the party knows or ought to know that there is occasion for its exercise. Ought the holders of this note when it fell due to have known that intermediate its discount and maturity the endorser had changed his residence? They had no reason to expect such an event, and of course no considerations of diligence could have prompted them to institute any inquiry in relation to it. Where the place of an endorser's residence is established at the time when a note having the usual time of bankable paper to run

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is discounted, and is at such a distance from the place of payment as to repel the presumption that a removal (in case it happens before the note falls due) would come to the knowledge of the holders, and no actual knowledge is brought home to them, a notice of demand and non-payment directed to such place of residence is sufficient, although the endorsee has in fact, in the mean time, become a resident of another place.

Such I take this case to be, and am therefore of opinion that the notice given to the defendant was sufficient to charge him as endorser.

Judgment for plaintiffs.

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WADSWORTH VS. HAVENS.

THIS was an action of replevin, tried at the Madison circuit in April, 1828, before the Hon. NATHAN WILLIAMS, one of the circuit judges.

The plaintiff proved that on the 16th May, 1827, he purchased of one Jeremiah Tift a yoke of oxen, for which he paid \$60, which were driven away on the 11th June, 1827, by the defendant. The defendant proved a judgment in his favor against Jeremiah Tift, entered on a bond and warrant of the date of the 26th May. 1827, an execution issued thereon on the 29th May, and a sale by virtue of the execution on the 11th June, when he became the purchaser of the oxen in question, and took them into possession. The defendant then offered to prove that the sale of the oxen by Tift to the plaintiff was fraudulent. The plaintiff objected to that proof, unless the defendant first shewed that he was a *creditor* of Tift *at the time of the sale* of the oxen to him the plaintiff. This objection was sustained by the judge. Various other questions arose on the trial, which, not being considered by the court, are not here stated. The jury, under the direction of the judge, found a verdict for the plaintiff, with six cents damages. The cause came up on a bill of exceptions presented by the defendant, who moved for a new trial.

*Actual fraud in the conveyance of property may be shewn by a creditor, altho' his debt accrued subsequent to the conveyance sought to be avoided.*

*So a purchaser for valuable consideration has a right to avoid a precedent fraudulent conveyance.*

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*Burr*  
v.  
Veeder.

*C. P. Kirkland*, for defendant.

*P. Gridley*, for plaintiff.

*By the Court*, SAVAGE, Ch. J. In the case of *Reade v. Livingston*, (3 Johns. C. R. 481,) the late Chancellor Kent held that a voluntary settlement was void as to *antecedent* creditors, (being *constructively fraudulent* as to them,) but as to *subsequent* creditors, such settlement could be avoided only by shewing *actual fraud*; and for this he relied on a decision of Lord Hardwicke, in *Taylor v. Jones*, (2 Atk. 600.)

The defendant here was not only a *subsequent creditor*, but a *purchaser* for valuable consideration; and therefore, according to the third resolution in *Twyne's case*, (3 Co. 83,) had a right to avoid a precedent fraudulent conveyance.

This point alone is sufficient to authorise a new trial, and the other questions raised need not be discussed.

New trial granted.

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BURR vs. VEEDER.

Money erroneously paid by one party to another in mutual ignorance of facts which, if known, would have prevented the payment, may be recovered back in an action of assumpsit. So money paid by the holder of a mortgage to redeem the mortgaged premises from a sale for taxes, is a charge upon the land, and may be demanded upon foreclosure of the mortgage.

THIS was an action of assumpsit, tried at the Schenectady circuit in January, 1828, before the Hon. WILLIAM A. DUER, then one of the circuit judges.

On the 25th May, 1820, the defendant, for the consideration of \$1231,50, being the assignee of a bond and mortgage executed by one Lampman to one Van Arnum, assigned the same to the plaintiff. The bond and mortgage bore date 1st March, 1810, and were given to secure the payment of \$2000. At the time of the transfer to the plaintiff, a calculation was made, and the sum of \$1231,50, was ascertained as the amount due on the bond and mortgage, which was paid by the plaintiff to the defendant; the parties intending to ascertain, and believing they had ascertained, the true amount due. Subsequently it was discovered that the sum of \$37 had been paid to Van Arnum on 16th August, 1810, on account of the bond and mortgage, which, on a foreclosure of the mortgage by the plaintiff, was deducted from the amount



due on the same; and he now claimed to recover that sum of the defendant. The defendant was ignorant of this payment having been made when the bond and mortgage were assigned to him, and continued so at the time of the assignment to the plaintiff, who also then was ignorant of the fact. Van Arnum is insolvent.

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Whilst the defendant held the assignment he paid to the state officers \$62,72 to redeem a portion of the mortgaged premises which he had sold for taxes. This payment was made on 17th June, 1817. On the day subsequent to the assignment, the plaintiff entered into an agreement in writing with the defendant to pay the amount of the taxes so paid by the defendant, if they, or any part of them, could be collected under the mortgage assigned to him. The mortgage was foreclosed in chancery by the plaintiff, and he became a purchaser of part of one of three lots included in the mortgage, at a fair price and value, (as stated in the case.) Whether the mortgaged premises on the sale produced the whole amount of the mortgage monies, or more, or less, does not appear. A verdict was taken for the plaintiff for the \$37, with interest, subject to the opinion of this court, on a case made.

*M. T. Reynolds*, for plaintiff. The plaintiff is entitled to recover back the excess paid beyond the real amount due on the bond and mortgage, it being paid under a mutual misapprehension of facts. (1 T. R. 285. 18 Johns. R. 485. 19 id. 73. 2 Day, 437. 3 Maule & Sel. 344. 1 Wendell, 355.)

*A. C. Paige*, for defendant. Whether or not the plaintiff is entitled to recover the excess paid by him, the defendant has a right to claim as a set-off the money paid by him to redeem the land. Such payment was a charge upon the land, and could be demanded by the holder of the mortgage. The presumption is, it has been collected. The plaintiff having engaged to pay if it could be collected under the mortgage, the defendant has a right to ask that it be now allowed to him under his notice of set-off. This demand was not objected to on the trial.

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*Reynolds*, in reply. A demand arising under a special agreement, like that set up by the defendant, cannot be given in evidence under a *general* notice of set-off, which only was given in this cause; and this being a case subject to the opinion of the court, the objection may now be taken.

*By the Court*, MARCY, J. It was clearly the intention of the parties that the mortgage should be transferred for the balance actually due at the time of the transfer; previous to which time there had been a payment of \$37 not taken into the account in ascertaining the balance, nor known to either party. The amount of this payment, with the interest, ought to be allowed to the plaintiff.

But the defendant claims an off-set of taxes charged upon the mortgaged premises, and paid by him to redeem them; and the plaintiff agreed to pay these taxes if they, or any part of them, could be collected under the mortgage. It is clear that the amount paid for these taxes is as much a charge on the premises as the money specified in the mortgage, (1 Hopk. Ch. R. 283;) and it is not shewn that the plaintiff did not or could not collect them. He should have caused this disbursement to be included in the master's report of the sum due on the mortgage. By law he had a right to collect it, and if by the facts he was prevented from doing so, he should have shewn it. I am therefore of opinion that the defendant ought to have judgment for the balance paid for the taxes, and interest thereon, after deducting the \$37 and the interest of it.

There was something said on the argument of the insufficiency of the notice to admit of the set-off claimed by the defendant. I have not taken that objection into consideration, because the notice was not included in, nor did it accompany the case.

Judgment for the defendant for the balance.

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Walbridge.

WILLIAMS and others vs. C. &amp; H. WALBRIDGE.

THIS was an action of assumpsit, tried at the Onondaga circuit in September, 1827, before the Hon. ENOS T. THROOP, then one of the circuit judges.

The defendants were sued as the endorsers of a promissory note for \$450, drawn by the firm of John Rogers & Co. payable to the defendants. The firm of John Rogers & Co. consisted of two persons, viz. John Rogers and Thomas J. Field. Rogers was indebted *individually* to the plaintiffs in the sum of \$452, he drew the note in question, signed the name of his firm to it, procured the endorsement of the defendants and delivered the note to the plaintiffs. The endorsement of the defendants was procured under an arrangement subsisting between them and the firm of John Rogers & Co. to endorse for each other. *Field*, the partner of Rogers, was not present when the note was made, and never consented to it; it did not appear that the plaintiffs knew that the note was made without his consent. On this state of facts the plaintiffs were nonsuited, who excepted to the decision of the judge. In the progress of the trial the judge decided that the defence set up was admissible under the general issue, and that Rogers was a competent witness to prove the defence, he having been released by the defendant; to which decisions, exceptions were also taken. A motion was now made to set aside the nonsuit.

*J. Watson & J. A. Spencer*, for plaintiffs. Rogers was an incompetent witness. The defendants cannot avail themselves of a defect in the making of the note; even had the signatures of the makers been a forgery, the defendants as endorsers would not be protected. In an action against an endorser, it is not necessary to prove even the making of the note. Although a partner of a firm may object that the name of the firm has been used without his knowledge or consent, in the making of a note for the individual debt of his

*Endorsers of a note made in the name of a firm by a member thereof without the assent of his co-partner, and passed by him for his individual debt, are not liable for its payment. The burden of proof lies with the holder to show that the several members of a firm assented to a note, in the name of a firm, where such note is taken for the private debt of one of the partners.*

*The defence that the note of a firm has been given by one partner for his individual debt, without the assent of his co-partner, is admissible under the general issue.*

*The maker of such note is a competent witness to prove the defence.*

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co-partner, the endorser cannot avail himself of such defence ; but if he can, he must plead or give notice of it, so as to apprise the holder. (5 Cowen, 709.)

*J. Wilkinson*, for defendants. Any matter which shews that the plaintiff never had a cause of action may be given in evidence under the general issue, and the defendants, standing in the character of sureties may avail themselves of the same defence that Field, the partner of Rogers, without whose consent the note was made, might have set up. (1 Chitty's Pl. 472. 13 Johns R. 56. 15 id. 230. 1 East, 48. 7 id. 210. 13 id. 175. 2 Caines, 246. 2 Johns. R. 300. 4 id. 251. id. 262. 19 id. 154. 1 Wendell, 119.) The case cited from 5 Cowen, 709, is a dictum of senator Colden, it is an *obiter* opinion, there was no point in the case calling for the opinion. The burden of proof, that the note was made with the consent of or ratified by the partner who did not make the note, is cast upon the holder. (19 Johns. R. 158.) Rogers was a competent witness. (5 Cowen, 23. id. 153. 8 id. 108.)

*By the Court*, MARCY, J. The objection to Rogers as a witness cannot be sustained on the ground of interest. Even without the discharge, he would not, for that cause, have been an incompetent witness. This point was decided in the case of *Ridley v. Taylor* (13 East, 175.) But there is another objection raised against him, independent of his interest in the event of the suit. The rule of the civil law, that *nemo allegans suam turpitudinem est audiendus*, is supposed by the plaintiffs to apply to a person impeaching the validity of negotiable paper, to which he has given currency by being a party to it. So undoubtedly was the decision in the case of *Walton v. Shelly*, (1 T. R. 296,) which was adopted by this court in *Winton v. Saidler*, (3 Johns. C. 185.) and in other cases subsequently decided ; but this rule has been departed from in England, (7 T. R. 591,) and also in this state. (5 Cowen, 23. id. 153.) The true rule is that adopted in the latter case, viz. " That every person not interested in the event of the suit, nor incapacitated by his religious tenets, or by the conviction of an infamous crime, is a competent wit-

ness. All other circumstances affect his credit only." But there was sufficient evidence without the testimony of Rogers to warrant the decision of the judge; the nonsuit would not, therefore, be set aside, even if he had been improperly admitted. It appears from the case, independent of the testimony of Rogers, that the note was given for his individual debt.

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The court of king's bench decided in the case of *Ridley v. Taylor*, above referred to, that if a partner gave the note of his firm for his individual debt, it should be presumed to be done with the assent of the firm until the contrary appeared. This court has given its express and repeated sanction to a different doctrine. If a creditor takes the note of a company for the private debt of one of the partners, it is for him to prove that the company assented to the giving of the note. (16 Johns. R. 38. 19 id. 158.) Although the English rule as applied to this case would seem to be the most reasonable, yet as a general rule, tested by its effect upon an entire class of cases, that which has been adopted by this court is probably most salutary in its operation; at all events we are bound to apply it to this case.

A question was made on the argument, whether the endorsers in this case could avail themselves of the same defence which would be allowed to the firm of John Rogers & Co. This point was expressly decided in favor of the defendants in the case of *Livingston v. Hastie and Patrick*, and *Livingston v. Tyrie*, (2 Caines' R. 246.) It was not questioned in the case of *Ridley v. Taylor*, but that the acceptor of a bill of exchange would have the same defence as the company whose name had been put to it by one of the partners for his private debt.

On the authority of a dictum of Colden, senator, in the case of *Smith v. Lasher*, (5 Cowen, 709,) it was urged that the defence here interposed cannot be received under the general issue. The decision of this point was not necessarily involved in that suit, and the incidental remark of Mr. Colden is not to be regarded as an adjudication of authoritative influence in this court. I think it is not in accordance with well

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established principles in relation to what is or is not admissible as a defence under the general issue. Any defence that shews that the plaintiff never had a valid cause of action against the defendant is admissible under the general issue. Such was the defence in this case.

Motion to set aside the nonsuit denied.

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WARDELL and others vs. HUGHES and MOORE.

A new trial will be granted for the misdirection of the judge, altho' the evidence may have warranted the verdict found where the chances are equal that the verdict resulted from the mis-direction. The drawers of a note cannot object that it was negotiated contrary to its terms, where they themselves put it into circulation.

THIS was an action on a promissory note in these words: "Three months after date, for value received, we promise to pay to the order of Gilbert Howell and David Morris one hundred and fifty dollars, payable and *negotiable* at the Bank of Ontario in Canandaigua. Sept. 30, 1826." (Signed) 'Harry Moore & Co., Wm. Hughes,' and 'endorsed by the payees. The action was brought by the plaintiffs as *endorsees* against the *makers*.

The note was made and endorsed for the purpose of *renewing* a note at the Ontario Bank, which was about falling due, made by Hughes and Moore, and endorsed by Howell and Morris, for the accommodation of the drawers. Instead of so using it, Hughes passed it to the plaintiffs in New-York, by whom it was received as collateral security for the payment of a note they held against him, bearing date in September, 1826. The drawers had been in partnership, which, however, had been dissolved previous to September, 1826; but at the dissolution they were indebted to the plaintiffs. Evidence was given both as to the *assent* and *dissent* of Moore to the use which had been made of the note, but it was not very explicit. The judge charged the jury that by the terms of the note its negotiability was restricted to the place where it was made payable; and he further instructed them that if they should be of opinion that the note was applied by Hughes to the payment of an *individual* debt, without the assent of Moore, the plaintiffs were not entitled to re-

cover. The jury found for the defendants. A motion was now made to set aside the verdict.

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*Greene C. Bronson*, (attorney general,) for the plaintiffs. The negotiability of the note was not restricted by its terms. The words *payable and negotiable at &c.* were senseless, and did not render it necessary for the plaintiffs to aver or prove a demand of payment at the place. (17 Johns. R. 248.) To destroy the negotiable quality of a promissory note, there must be express negative words. (Chitty on Bills, 137, 8.) The misapplication of a note cannot be alleged against *bona fide* holders without notice. (10 Johns. R. 198. 15 id. 270. 17 id. 176. 4 Cowen, 573.) The verdict was against evidence.

*C. P. Kirkland*, for defendants. The case of *Woodhull v. Holmes*, (10 Johns. R. 221,) establishes this defence. The note on its face bore evidence that it was given for a specific purpose. Besides, it was not negotiated, but barely deposited as collateral security. On the whole case the verdict was right, and ought not to be disturbed.

*By the Court*, MARCY, J. Admitting the application of the note by Hughes to have been *assented* to by Moore, it cannot be objected, by the *drawers* of the note, that it was negotiated contrary to its terms, and the object and intent with which it was made. When the *endorsers* are called upon, they may avail themselves of the defence, if it exists, that the note was made in renewal of a former note on which they were *endorsers*, and that the holders had actual or constructive notice of the fact.

The evidence as to the assent of Moore was submitted to the jury, and they were correctly instructed that if the note was applied by Hughes to his *individual* debt, without the assent of Moore, the plaintiffs were not entitled to recover. (16 Johns. R. 38. 19 id. 158. *Williams v. Walbridge*, ante, p. 415.) But I think the judge erred in telling the jury that by the terms of the note its negotiability was restricted to the place where it was made payable. The jury found a verdict for the defendants, whether on the ground that the note had

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been negotiated at a place different from that contained in the body of the note, or on the ground that it had been passed by Hughes for his individual debt, and that the assent of Moore had not been shewn, it is impossible for us to determine. If the verdict was found on the first ground, it ought to be set aside for the mis-direction of the judge; if on the latter, the evidence being of such a character that it might be regarded as insufficient to shew the assent of Moore, it should not be disturbed. Inasmuch, therefore, as the verdict may have resulted from the error of the judge, and I think there is an even chance that it did, a new trial ought to be granted.

New trial granted.

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THE PEOPLE vs. J. T. CALHOUN.

A justice of the peace has no right to deny an adjournment because a defendant refuses to pay his fees for drawing a bond on the defendant's demanding an adjournment. If he, for such cause, refuses an adjournment, he is liable to an indictment for a misdemeanor.

THE defendant was indicted for a *misdemeanor* in his office as a *justice of the peace* of the county of Monroe, in refusing to adjourn the trial of a cause depending before him. He was convicted; but judgment was suspended by the court of sessions of that county until the advice of this court could be obtained.

One Guernsey was brought before the defendant on a warrant issued by him in a civil suit, and applied for an adjournment until the next day. The defendant decided that he was entitled to the adjournment on his complying with the requirement of the statute, by giving security by bond for his appearance on the adjourned day, and proceeded and made out a bond. Before the bond was signed, the defendant demanded of Guernsey *twenty-five cents*, the fee allowed to justices for drawing and taking a bond in such cases; Guernsey refused to pay the money; whereupon the defendant refused to receive the bond and to adjourn the cause, and the trial proceeded. On the trial on the indictment, the defendant insisted that the payment of his fee was a *condition precedent* to his receiving the bond and adjourning the cause. A ma-



majority of the court thought otherwise, but suspended judgment.

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*By the Court, MARCY, J.* The magistrate misapprehended his duty in refusing the adjournment unless his fees for drawing the bond were paid. The payment of the fees was not a condition precedent to the adjournment of the cause; and the magistrate erred in withholding from the party his right on account of the non-payment of them. We therefore advise the court of sessions to proceed to judgment.

END OF OCTOBER TERM.



**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT OF JUDICATURE**  
**OF THE**  
**STATE OF NEW-YORK,**

IN JANUARY TERM, 1830, IN THE FIFTY-FOURTH YEAR OF OUR INDEPENDENCE.

ANON.

A MOTION was made on the first day of term for an order to prosecute the bond given by a sheriff for his appearance, on being arrested on an attachment for not bringing in the body of a defendant returned taken on a *capias*; the sheriff not appearing when demanded. Cur. ad. vult.

At a subsequent day, Mr. Justice SUTHERLAND delivered the opinion of the court, that the *Revised Statutes*, (vol. 2, 539, § 27,) did not require a departure from the practice of the court of giving a sheriff a day in term for his appearance subsequent to the return day of the attachment; and that a rule ordering the prosecution of a bond in such cases would not be made until the *quarto die post* the return of the attachment.

A rule ordering the prosecution of a sheriff's bond, given on being served with an attachment, will not be granted until the *quarto die post* the return.

ALBANY.  
January, 1830.

Dalrymple  
v.  
Lamb.

In the matter of WARNER and PHELPS, proceeded against  
as absconding debtors.

Where persons proceeded against as absconding or concealed debtors satisfactorily shew that they had not absconded or were not concealed, a supersedeas will be granted, with costs, although the creditor had reason to believe that the debtors had absconded or were concealed.

MOTION for a supersedeas to an attachment issued in this case. From the evidence given by the debtors, it satisfactorily appeared that they had not absconded, and were not concealed at the time that the petition was presented for an attachment; although, from the facts and circumstances, the creditor and his witnesses were authorized to say that they believed that the debtors had absconded or were concealed. The motion for a supersedeas was granted, with costs; the costs of the last term to be set off against the costs of this motion.

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ANON.

Notice of a rule to amend a pleading, where such rule is of course, need not be given.

A QUESTION arose during this term, whether it is necessary to give notice of a rule to amend a pleading where the amendment is of course; and the Court said, that although the rules of the court require the entry of the rule for amendment notice of the rule need not be given.

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DALRYMPLE, by *prochien ami*, vs. LAMB.

A *prochien ami* must be a responsible person.

MOTION that a responsible *prochien ami* be appointed, or that proceedings stay. This suit was commenced by the plaintiff, by his father as his *prochien ami* who was represented to the court as very poor and wholly irresponsible for the costs of the suit.

P. Gridley, for defendant.

J. A. Spencer, for plaintiff.

*By the Court, SAVAGE, Ch. J.* The *prochein ami* must be a responsible person. The proceedings must therefore stay until such appointment be made. (Strange, 718. 1 T. R. 491.)

ALBANY  
January, 1830.  
Anonymous.

BIRDSALL and BIRDSALL, ex'ts. vs. PIXLY.

MOTION for a rule to produce papers. A petition was presented, stating that this suit had been commenced for the recovery of a sum of money due as rent on a lease executed by the testator to the defendant; that the lease had been clandestinely taken from the testator by the defendant, or by his aid and procurement; and that the plaintiffs were unable to declare, &c. The petition further stated that it was intended to lay the venue in the county of Chenango. The petition was verified by affidavits.

A rule to shew cause why an attachment should not issue, will be ordered on a petition for the production of papers to enable a party to declare.

*The Court* ordered the lease to be deposited in the clerk's office of the county of Chenango, within twenty days after service of notice of the rule of the court, or that the defendant shew cause, by the first day of the next term, why an attachment should not issue against him. (2 Revised Statutes, 199.)

ANON.

MOTION for order to remove a cause from the superior court of the city of New-York into this court.

*By the Court, SUTHERLAND, J.* The affidavit upon which this motion is made is defective in not complying with the rules of this court. To entitle a party to an order to remove a cause from the superior court of the city of New-York into this court, or to a rule to change the venue, he must state that the witnesses named by him are each and every of them material to his defence, as he is advised by his counsel and

every of them he cannot safely so proceed to trial; in each case stating as he is advised by counsel and verily believes.

To entitle a party to remove a cause from the superior court, or to change the venue, he must state that the witnesses named by him are each and every of them material to his defence; and that without the testimony of each and

ALBANY, verily believes, and that without the testimony of each and  
January, 1830. every of them, as he is also advised by counsel and verily be-

The People believes, he cannot safely proceed to the trial of the cause.

v.  
Medical Soc'y  
of N. Y.

THE PEOPLE, on the relation of S. B. Jewett, vs. MONROE  
COMMON PLEAS.

*A mis-recital of the day of the rendition of a justice's judgment in an appeal bond is fatal.* MOTION for a mandamus. The common pleas of Monroe quashed an appeal for an erroneous recital in the appeal bond of the day on which the judgment before the justice was rendered. It was rendered on the *twentieth* August, but in the bond was recited to have been rendered on the *twenty-first* day of August, 1819.

*By the Court, MARCY, J.* The common pleas decided correctly. There was no such judgment as was recited in the bond. Had the day of the rendition of the judgment been omitted, there would have been no variance, and the bond would have been good, as was held in 2 Wendell, 292; but being inserted, it becomes material; and a wrong or false date being given, the objection to the bond was fatal.

Motion denied.

THE PEOPLE, on the relation of Henry G. Dannel, vs. THE  
MEDICAL SOCIETY OF THE COUNTY OF NEW-YORK.

*An initiation fee may be demanded from physicians and surgeons on becoming members of county medical societies.* MOTION for a mandamus. The relator was duly elected a member of the Medical Society of the County of New-York, but his certificate of membership was refused to be delivered to him until he paid an initiation fee of ten dollars, in compliance with the by-laws of the society. This he refused to do; and he now asked for a mandamus commanding the society to deliver to him his certificate.

T. Nims, for relator.

Hoffman & Tallman, contra.

*By the Court, MARCY, J.* By the act to incorporate medical societies, (2 R. L. 222, § 14, passed April 10th, 1813,) county medical societies are authorized to make and establish such by-laws and regulations, relative to the affairs, concerns and property of such societies; relative to the admission and expulsion of members; and relative to donations and contributions, as they shall think fit and proper. In the revision of the statutes, the *powers* of those societies are left untouched, and remain as they were under the act of 1813. If power is not expressly given or necessarily implied to require an initiation fee from all persons admitted members of such societies, there is at all events nothing in the act prohibiting such demand. The only restriction is, that the by-laws to be established should not be contrary to, nor inconsistent with the constitution or laws of the state, or of the United States, nor repugnant to the by-laws, rules and regulations of the state medical society. Every physician and surgeon is required by law to become a member of the society of the county in which he resides within a limited time, or he forfeits his licence; and the act being thus compulsory on him, it is urged that having complied with the law, and having shewn himself entitled to admission and been in fact elected, a certificate of membership ought not to be withheld from a physician on account of a refusal to pay an initiation fee. The answer is, that power is given to the society to establish by-laws relative to the admission of members. A charge of an initiation fee is usual in most societies or associations of the kind. Without it they could not exist, where no provision is made by law to defray their necessary incidental expenses. There is nothing in the statutes relative to those societies prohibiting the charge of an initiation fee, nor is such charge deemed contrary to or inconsistent with the laws of the state. The motion for a mandamus is therefore denied.

Motion denied.

ALBANY,  
January, 1830.

The People  
v.  
Medical Society of N. Y.

ALBANY,  
January, 1830.

Bush  
v.  
Phillips.

BUSH vs. PHILLIPS.

An order to stay waste will be granted after commencement of suit on a proper affidavit. Whether notice of the application should be given to the defendant, *quere*.

MOTION for an order to prevent waste. This motion was made on an affidavit, stating that an action of ejectment had been commenced during the present term for the recovery of 400 acres of land in the county of Sullivan; that the principal value of the premises consists in the pine timber and other timber thereon; that the defendant, with several persons in his employment, is now actually engaged in cutting down the pine timber with a view of converting the same into logs, boards, &c. and taking and carrying away the same; and that the deponent (the plaintiff) verily believed that the defendant would continue to commit waste unless prevented by the order of this court.

R. S. Street, for plaintiff.

By the Court, SUTHERLAND, J. This case calls for the exercise of the power of this court, conferred by the Revised Statutes, (2 R. S. 336, § 18.) The only doubt as to the granting of the order has arisen from the application being *ex parte*, notice not having been given to the defendant. Whether notice should be required of applications for orders of this kind, we do not now determine. Under the circumstances of this case, we grant the order.

Order granted.\*

\* The section of the act is in these words. "After the commencement of any action for the recovery of land, or for the recovery of the possession of land, the defendant shall not make any waste of the land in demand, pending the suit; and if such defendant shall commit waste, the court in which the suit is pending shall have power, on the application of the plaintiff, to make an order restraining the defendant from the commission of any further waste thereon."



ALBANY,  
January, 1830.JACKSON  
V.  
STILES.JACKSON, ex. dem. T. M. Wood, vs. STILES, Johnson  
tenant.

MOTION to stay proceedings in ejectment. On the 14th October last, a declaration in ejectment was served on the tenant for the recovery of the possession of certain lands. On the 17th November, the tenant called on the lessor of the plaintiff to ascertain the precise premises claimed by him, and on learning the same, offered to surrender the possession of the premises, to pay the costs of the suit, and to pay the mesne profits to which the lessor of the plaintiff was entitled; and if they could not agree as to the amount of the mesne profits, the defendant offered to enter into a stipulation by which the lessor of the plaintiff should be in the same condition in regard to his claim for the mesne profits as if a judgment had been rendered against the casual ejector in the ejectment suit. The lessor of the plaintiff claimed as mesne profits three dollars per acre yearly for the time that the defendant had been in possession of the premises; and on the tenant saying that such claim was unreasonable, he answered that he meant to charge more than the possession was worth, and that he would not settle with the tenant unless he complied with his terms. On this state of facts, the tenant applied for a stay of proceedings on such terms as the court should think proper to order. The plaintiff had proceeded in the suit, and entered judgment against the casual ejector.

In ejectment, where the tenant after suit brought offers to surrender the premises, to pay the costs, and to enter into a stipulation as to mesne profits, giving the plaintiff the same rights as if judgment was entered against the casual ejector, the court will stay proceedings.

*J. Fleming, jun.* for the motion.*C. A. Baker,* contra.

*By the Court,* SUTHERLAND, J. The conduct of the plaintiff is oppressive, and the defendant has offered to do all that could be required of him. A tender of amends cannot be pleaded in this action; the court therefore order that all proceedings on the part of the plaintiff be stayed for thirty days; that he procure the costs in the suit which accrued previous to the 17th November last to be regularly taxed and demand-

ALBANY,  
January, 1830.

Clapp  
v.  
Van Epps.

ed of the tenant; and if such costs be paid within 20 days after demand, and the possession of the premises in question quietly surrendered to the lessor upon demand made, then all further proceedings in this cause to be perpetually stayed. The court further ordered that the lessor of the plaintiff pay the costs of this application. The judgment was permitted to stand, to enable the plaintiff to avail himself of it in support of his action for mesne profits.

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JACKSON, ex. dem. Salisbury, vs. SALISBURY.

A rule to appear and plead in ejectment will be ordered where the service of the declaration is on the wife of the defendant on the premises.

RULE to appear and plead in ejectment. The declaration was served by delivering it to the wife of the defendant on the premises claimed. The service not being on the defendant personally, leave was asked, pursuant to the provisions of the Revised Statutes, (vol. 2, p. 305, § 15,) to enter a rule for the defendant to appear and plead, which was granted.

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CLAPP vs. VAN EPPS.

Sheriff's fees on bringing up a prisoner on a *habeas corpus ad testificandum*, are regulated by the fee bill.

TAXATION of costs. The plaintiff charged for fees due sheriff for bringing up a witness on a *habeas corpus ad testificandum* at the following rates, viz.: Attendance per diem, \$3; expenses per diem, \$1.50; mileage, 19 cts. per mile; and relied upon 9 Johns. R. 328, and 13 id. 123. The defendant insisted that the sheriff was entitled only to the allowance made by the fee bill in 2 R. L. 20.

*J. P. Cushman*, for plaintiff.

*Dutcher & Harris*, for defendant.

*By the Court*, SAVAGE, Ch. J. The allowance approved by the court in *Smith v. Birdsall*, (9 Johns. R. 328,) was to an officer for bringing up a sheriff on an *attachment* for con-

tempt in not returning process. For such service no provision was made in the fee bill, and the verdict of the jury was approved as a reasonable allowance. Here the prisoner was brought up on a *habeas corpus ad testificandum*; the fees of the sheriff are expressly regulated by the fee bill and fixed at \$1.50, besides mileage at the rate of 12½ cents per mile, which we have said may be computed as well for returning from as going to the place of trial. (7 Cowen, 424.) Let the bill be taxed accordingly.

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January, 1830.

The People  
v.  
Mather.

### THE PEOPLE vs. ELIHU MATHER.

MOTION to set aside verdict. In November, 1828, the defendant was indicted at the *Orleans* oyer and terminer for a conspiracy to kidnap *William Morgan*. In March, 1829, a certiorari was presented to that court removing the indictment into this court, to which a return was made and filed in the Utica clerk's office on the 18th May, 1829; on which day a plea of not guilty, and a replication by the *special attorney*, taking issue, were also filed in the same office. In November last, the issue thus joined was tried at the Orleans circuit, and the defendant was acquitted. Since the trial, the special attorney discovered that at the last May term of this court a rule was entered directing the issue joined in this cause to be tried at a circuit court to be holden in and for the county of *Monroe*, and on that ground now applies to set aside the verdict; and also moves that the rule of May term be vacated, on affidavits that the rule was obtained without notice to the public prosecutors having charge of this suit; and further, that the issue on the indictment against the defendant be directed to be tried at the next circuit court to be holden in and for the county of Orleans.

On the part of the defendant it appeared, by the affidavits of his counsel, that the affidavit on which the the certiorari was

A rule merely directing a criminal cause removed into this court by certiorari to be tried in a county other than that in which the offence is alleged to have been committed, will not authorize the trial in such county, without a suggestion on the roll that a fair and impartial trial cannot be had in the county where the indictment was found; and such suggestion cannot be made without special leave obtained from the court.

A rule to change the place of trial may be waived

by the parties going to trial in the county where the indictment was found.

A rule entered in the minutes of the court during one of its terms, without the express direction of the court, and not asked for by either party, will be regarded as a nullity.

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January, 1830.

The People  
v.  
Mather.

granted was transmitted to counsel attending at the May term, with instructions to present the same to the court in case a motion was made on the part of the prosecution as to the trial of the issue, to obtain a direction that the issue should be tried at the Orleans circuit, instead of the Orleans *oyer and terminer*; that there was no intention on their part to obtain a rule for the trial of the issue at the *Monroe* circuit, nor had they given notice of an intended application for such rule, and that the rule must have been entered by mistake.

*J. C. Spencer*, special attorney. The court had authority to order the trial in *Monroe*, (1 Chitty's Crim. Law. 494, 5.) Until vacated, the order of May term was valid, and deprived the *Orleans circuit* of jurisdiction. There has therefore been a mis-trial, and a *venire de novo* should be awarded. (6 Coke, 14.) The appearance of the parties at the Orleans circuit, and their consent to go to trial, could not give jurisdiction. (3 Caines, 129.) The counsel for the people cannot be deemed to have consented, as they were ignorant of the existence of the rule of May term until after the trial. If the court had no jurisdiction of the cause, the oaths administered to the witnesses were extra-judicial. Nor can the defendant complain of being twice put in jeopardy should a new trial be granted, as the proceedings were wholly invalid.

*D. D. Barnard*, for the defendant. The issue in this case was properly tried at the Orleans circuit; there the indictment was found, and there the trial must have been had unless an order had been made by the court, directing the trial in another county, on a special application made to them. (7 Cowen, 127, 9.) A regular application for such order is not shewn to have been made; on the contrary, from the shewing of the public prosecutor himself, it is manifest that such application was not made. It is true, a rule appears to have been entered directing the trial of the issue in another county, but such rule is disavowed by the defendant; it was not asked for nor desired by him. It must therefore have been entered by mistake, and is irregular and void, and the court will not give such effect to a rule thus appearing on their minutes, as to subject a defendant to a second trial.

If the rule be considered a nullity, *consent* was not necessary to give the Orleans circuit jurisdiction. The *nisi prius record* was sufficient authority to the judge to try the cause; no rule was necessary for that purpose.

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January, 1830.

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v.  
Mather.

*By the Court, MARCY, J.* The offence charged upon the defendant is stated to have been committed in the county of Orleans. The indictment was found, and the trial had there; yet it is supposed that the trial was irregular, and we are now asked to set it aside. A copy of a rule has been produced from the minutes of this court at the last May term, directing this cause to be tried in the county of Monroe. It is conceded that neither party asked for such rule, and it is equally certain that the court gave no direct order for its entry. The existence of the rule was not known to the public prosecutor at the time of the trial, and the defendant's counsel, though they had seen a certified copy of it, had reason to believe that no such rule had been granted. I think the court may regard as a nullity an entry in its minutes not made by its direction, nor asked for by either party to the suit in which it is made. If under any circumstances a rule can be disregarded, this ought to be so treated; for, in addition to the fact that it appears affirmatively that it was not moved for by the parties nor granted by the court, neither party now undertakes to set it up, or claims the benefit of it.

But if considered as an authorised entry upon our minutes, still it does not, in my opinion, render the proceedings in this cause at the Orleans circuit a mis-trial. There is no such thing as changing the venue in a criminal case; criminal actions are local, though under peculiar circumstances the *place* of trial may be changed, which however cannot be done by a mere direction of the court, to try it in a county other than that in which the offence is charged to have been committed. If the parties had conformed to the rule entered in this case, and tried the cause in the county of Monroe, there would then have been, what it is said there now is, a mis-trial. The *nisi prius record* and *postea*, when returned into this court, would have shewn an offence charged to have been committed in Orleans county, an in-

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Mather.

dictment found there, and a trial had in Monroe. The record would exhibit upon its face a mis-trial, unless it contained a suggestion that a fair and impartial trial could not be had in the county where the offence was committed, and that in consequence thereof a trial had been ordered in the adjoining county. But how could such suggestion have been made upon this record? It is not entered of course, and the rule now produced furnishes no authority to either party to make it. It could not be expected that the court would permit such suggestion after the trial, because there would be no pretence that it was true. The suggestion is always made on the record before trial, and it seems to me that it is necessary, to confer jurisdiction to try the cause in any other county than that where the offence is charged to have been committed.

The mode of changing the place of trial in a criminal case is, to move the court, on affidavit shewing the necessity of the change, for leave to make the requisite suggestion on the roll. Cause must be shewn before the court will permit it to be entered. (1 Chit. C. L. 495.) From the cases of *The King v. The Inhabitants of St. Mary*, (7 T. R. 735,) and *The King v. Harris*, (3 Burr. 1330,) it not only appears that the suggestion must be made before the record is sent down for trial, but that it is never entered without its truth is proved to the court, and the adverse party notified to shew cause, if there be any, against it. Indeed it is in a manner confessed on the record, because it is entered with a *nient dedire*. It is very evident, from this view of the subject, that giving to this rule all the operation that it can in any wise have, it did not change the place of trial. The place was the same after the entry of the rule as it was before, and the rule could not therefore, in my opinion, invalidate the trial.

There is another view of this case which seems to bring us to the same result. By going to trial without regard to the rule, the parties may be considered as having waived it, and neither party will now be heard to set it up to impeach what has been done incompatible with it. Both have consented to try the cause in Orleans county. It was said, on the argument, that consent will not confer jurisdiction. This

is true, but it is not applicable to this case. It is not contended, on the part of the people, that an express order of this court is necessary to authorize the circuit court of the county where the offence was committed, to try this case after being removed into this court by certiorari. The cause was actually taken down and tried without such an order. The circuit court of Orleans county had jurisdiction to try it before the rule was entered; and if the rule of this court to try it in another county was dispensed with, the circuit court of Orleans county had the same jurisdiction in relation to this cause that it had before the rule was entered. If the venue in a transitory action should be changed by a rule of this court, and the party who had obtained the rule should waive it and go down to trial in the county where the venue was originally laid, I should not expect to hear it urged to us that the circuit court had not jurisdiction of the cause, and that its proceedings were a nullity.

Again; the *nisi prius record* is in the nature of a commission from this court to the *nisi prius* judge to try the cause; and in this case we may well consider it sufficient to countervail the order which is found on our minutes. There appears to be no objection to granting that part of the motion which asks to have the rule of last May term vacated. We are disposed to look upon it as a nullity, and direct a rule accordingly to be entered vacating it.

SUTHERLAND, J. was inclined to consider the rule of May term a nullity; but if validity was given to it, it was analogous to a rule to change the venue in a personal action, which it was competent to the parties to waive and to proceed to trial in the county where the venue was originally laid. This had been done here. The offence being charged to have been committed in Orleans, and the cause having been removed into this court by *certiorari*, there was no necessity for a rule directing its trial at the circuit of that county. The *nisi prius* roll gave authority to the judge to try the cause.

The *Chief Justice* concurred.

Motion to set aside verdict denied, and rule of May term vacated.

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The People  
v.  
Mather.

ALBANY,  
January, 1830.

Griggs.  
v.  
Peckham,

GRIGGS vs. PECKHAM and others.

In partition in a case of default, the proof exhibited must at least be such as would establish a *prima facie* right of recovery in an action of ejectment. The proof must, in the first instance, be submitted to the clerk.

PROOF of title in partition in cases of default. The default of the defendants having been entered for not appearing and shewing title to the proportions claimed by them in the premises set forth in the petition presented in this case, the plaintiff exhibited proof of his title and an abstract of the conveyance by which the same is held ; which proof was a deed in fee of one third of the premises described, from Brockholst Livingston, by his attorney George M. Peckham, to the plaintiff, bearing date the 18th day of December, 1827, duly acknowledged and recorded. No other proof was offered.

*By the Court, SAVAGE, Ch. J.* The proof in this case is utterly defective. The deed produced by the plaintiff is executed by an attorney, and his power is not shewn ; but admitting the deed to have been duly executed, it does not shew even a *prima facie* right to the property in question. It bears date only about two years since, and even possession under it is not shewn. We therefore do not feel ourselves authorized, upon this proof to determine the right, title and interest of the plaintiff.

As this is the first case which has arisen under the Revised Statutes, (2d vol. p. 321, § 22, 23,) where we have been called upon to determine the rights of the parties in partition, where a default has been entered, we think it well to intimate that the proof which we will require in cases of this kind will be such as in an action of ejectment would be considered as establishing a *prima facie* right in a plaintiff to recover the premises claimed by him ; and that the practice which we will adopt in relation to these cases will be to refer the taking of the proofs to the clerk, whose report, together with the abstract of title furnished by the plaintiff, must be submitted to the court.



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January, 1830.
  
 Andrews  
 v.  
 Cleveland.

## ANDREWS vs. CLEVELAND.

ORDER for bill of particulars. Issue was joined in this cause on 24th September last; on the 11th November, notice of trial and inquest for the Erie circuit was served at Canandaigua on the agent of the defendant's attorney, who resides in the city of New-York, for the 14th December. On the 27th November, the notice of trial being then received by the defendant's attorney, application was made by the defendant to the recorder of New-York for an order for a bill of particulars, which was on that day granted, directing the plaintiff to appear at the recorder's office on the 20th December, to shew cause why he should not deliver a bill of particulars, and staying all proceedings in the mean time. This order was served in the city of New-York on the agent of the plaintiff's attorney, who resided at Buffalo, on the 5th December, and was not received by him until the 14th December. The *twentieth* of December, the day for shewing cause, was on *Sunday*. On the 21st December, no peremptory order for a bill of particulars having been made and served, the plaintiff took an inquest at the Erie circuit, which was now moved to be set aside for irregularity, and on an affidavit of defence on the merits. It also appeared that the plaintiff had previously obtained a default for not pleading, which was set aside on an affidavit of merits at the last August term.

An order for a bill of particulars may be made at any time before the trial. When made after issue joined, it should be granted with caution.

J. M'Keen, for defendant.

H. B. Potter, for plaintiff.

*By the Court,* SUTHERLAND, J. It is unnecessary to say how the order to shew cause on a *Sunday* would have been regarded, as on the *twenty first* day of December, when the inquest was taken, its force as an order to stay proceedings was spent, and it was not continued by a peremptory order. The proceedings of the plaintiff were therefore

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v.  
Dean.

entirely regular, and the motion to set aside the inquest would be denied but for the affidavit of merits; and even on this ground the court have had their doubts. An order for a bill of particulars may be made at any time before the trial, on the application of either party, (2 Archbold, 221;) but when applied for by a defendant, after issue joined, it is a suspicious circumstance, and the officer granting an order should be well satisfied that the object of the party is not delay, and he should require a good excuse for the late application. There is reason to suspect that the order in this case was obtained with a view to delay, inasmuch as it was not followed up with a peremptory order. The court, however, are inclined to let in the defendant to defend the suit, permitting the plaintiff to perfect his judgment and hold the same as security, and ordering the defendant to pay the costs of this motion.

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THE PEOPLE, on the relation of Dobbs, vs. DEAN, clerk of New-York Common Pleas.

A minor is incapable of holding a civil office within this state; but it belongs not to the officer whose duty it is to administer the oath of office to refuse to administer such oath.

THE relator has been appointed, since the first day of January instant, a commissioner of deeds in the city of New-York. On presenting himself before the clerk of the common pleas of New-York to take the oath of office, the clerk refused to administer the oath, on the ground that the relator was a minor within the age of 21, and therefore incompetent to hold the office. The relator applies for a mandamus directing the clerk to administer the oath.

*By the Court,* SAVAGE, Ch. J. A minor and an alien are incapable of holding a civil office within this state, (1 Revised Statutes, 116, § 1;) but it is not the province of the officer to whom application is made to administer the oath of office to determine whether the person presenting himself is or is not capable of holding an office. It is the duty of such officer, on the production of the commission, to administer the

oath. If an appointment has been improvidently made, there is a legal mode in which it may be declared void. Let an alternative mandamus issue.

ALBANY,  
January, 1830.

Goodrich  
v.  
Stewart.

GOODRICH vs. STEWART.

**COSTS** in slander of title. The plaintiff declared that on, &c. she was seized in her demesne as of fee as of a good, sure and indefeasible estate of inheritance in fee simple of, in and to a certain lot of land situate, &c.; that the defendant, well knowing the premises, but contriving, &c. to bring the title of the plaintiff in and to the said lot into dispute and disrepute, and to injure and destroy the credit and ability of the plaintiff to pay certain monies, falsely and maliciously caused to be printed and published a certain advertisement, offering the lot for sale as the property of one John I. Tappen, (setting forth a sheriff's advertisement, whereby the premises were offered for sale by the sheriff, by virtue of an execution against one John I. Tappen, as the property of Tappen.) Special damage was also averred in the declaration. The defendant pleaded *non. cul.*, and on the trial of the cause the plaintiff recovered a verdict for six cents damages and six cents costs. The defendant asked for costs.

In an action of slander of title the plaintiff is entitled to full costs though the recovery be less than \$50.

*R. S. Street*, for defendant. The plaintiff not having recovered above the sum of \$50, but in fact only six cents, must pay costs to the defendant. The case is not within any of the exceptions of the *fourth* section of the act concerning costs, (1 R. L. 344.) A certificate of the judge was not given that the title to land came in question, which is the only evidence the court will look to. (2 Caines, 221. 11 Johns. R. 405.) The suit might have been brought in a justice's court.

Nor does the case come within the *sixth* section of the act limiting the plaintiff's costs to the amount of the damages recovered, even if considered an action of slander of title. (Tidd's Pr. 878, and cases cited.)

ALBANY,  
January, 1830.

Goodrich  
v.  
Stewart.

*A. C. Niven*, for plaintiff. The first section of the act concerning costs, gives costs in any action where damages are recovered. The fourth section, which gives costs to the defendant unless the plaintiff recovers above \$50, excepts actions in which the title to lands comes in question, and also actions of slander. Here the title was in question; and from the nature of the action, the certificate of the judge was unnecessary. The action also is for slander, which is a generic term, and includes libel and slander of title as well as slanderous words. In an action for a libel, where the plaintiff recovered only \$7, full costs were allowed to the plaintiff. (1 Cowen, 415.) The plaintiff is not limited in his costs to the amount of his recovery in damages. The sixth section of the act provides only for actions of assault and battery and for slanderous words, and does not apply to an action for slander of title. (Cro. Car. 140, 1. Bacon's Abr. tit. Costs.) Actions of slander, and actions in which the title to lands comes in question, are not within the jurisdiction of justices' courts.

*By the Court*, SAVAGE, Ch. J. The fourth section of the act concerning costs subjects a plaintiff in a personal action to costs unless he recovers \$50, but it excepts the action of *slander*, and certain other actions. In an action for *slanderous words*, if the damages are assessed under \$50, the plaintiff, by the sixth section of the act, can recover no more costs than damages. This section, however, is limited to the species of slander specified in it, and does not extend to libels or to slander of title. (Cro. Car. 140. Willes, 438. 2 Tidd, 878.) We have accordingly held, where a plaintiff in an action for a libel recovered less than \$50, that he was entitled to full costs, (1 Cowen, 415;) and upon the same principle the plaintiff here is entitled to full costs. This was an action of slander coming within the proviso of the fourth section; consequently, under the first section of the act giving costs in every action where damages are recovered, the plaintiff is entitled to costs; and not being deprived of them by the fourth section, nor limited in their amount by the sixth section, he is entitled to full costs.

Nor does the *justice's* court act interfere with this conclusion. This act, (Statutes, vol. 6, c. 294, § 33,) denies costs to a plaintiff failing to recover in a court of record a sum exceeding \$50, provided the suit might have been brought before a justice. This action could not have been commenced before a justice, because *slander* is expressly excepted from the actions in which jurisdiction is given to justices. (§ 1, p. 280.) The motion of the defendant for costs must therefore be denied.

ALBANY,  
January, 1830.

Brewster  
v.  
Stewart.

Motion denied.

#### BREWSTER VS. STEWART

MOTION for consolidation. Two suits were commenced by Brewster against Stewart by *capias*, served on the same day, returnable at the last August term. Two declarations were delivered, each containing one count on a justice's judgment, each judgment being for the sum of \$54,67, each rendered in the *month* of July, 1829, and a transcript of each was filed on the same day in the clerk's office of the county of Oswego; it was not, however, shewn that the judgments were *rendered* on the *same day*, nor was there an affidavit of merits. The defendant before pleading obtained an order to stay proceedings, and now moved that the causes be consolidated, and that the plaintiff pay the costs of the motion.

A consolidation rule will be granted where several actions are pending between the same parties brought at the same time, the causes of action in which may be comprised in the same declaration.

A defence on the merits need not be set up to entitle a defendant to the benefit of the rule.

*Smith & Brown*, for defendant, relied on 2 T. R. 639; 1 Johns. C. 28; Statutes, vol. 4, c. 280, § 7, enacted in 1818.

*W. C. Noyes*, for plaintiff. The object of compelling a consolidation of actions is to prevent the unnecessary accumulation of costs by the litigation of several suits at *nisi prius*, where the whole matter may be determined in one suit. (Tidd's Pr. 557.) Here there is no pretence of a defence; he has not put in a plea, and for aught that appears, never will.

ALBANY,  
January, 1830.

~~~~~  
Brewster
v.
Stewart.

This court have refused to consolidate actions, brought on several policies of insurance on one risk, though the question was the same on all, for the reason that the contracts were several; so they have refused to consolidate where the suits were on promissory notes, between the same parties; (1 Caine's R. 114, n. b.) and subsequently, where three suits were brought by the endorsee of three several notes against the same maker, all of which were due when the suits were commenced, a motion to consolidate was refused. (9 Johns. R. 262.) In the last case the court say, that when separate suits are brought upon notes or contracts made at the *same time* and which might have been united in one action, and when *the defence* is the same in all, they would be inclined to grant the rule; within this rule this motion cannot prevail, for it is not shewn that the judgments declared on were rendered at *the same time*, or that *the defence* would be the same as no defence whatever is set up.

By the Court, SAVAGE, Ch. J. The practice of the king's bench seems to extend the consolidation rule to all actions between the same parties, brought at the same time, where the causes of action might be comprised in the same declaration. This court has not gone the same length, and even as late as 9 Johns. R. 262, in a case decided in 1812, a motion to consolidate was refused where three suits were brought by the same endorsee against the same maker on three promissory notes, all due at the commencement of the suits, and they brought at the same time, solely because the notes varied in dates, sums and times of payment. By the act of 1818, however, the courts are authorized, whenever several suits are brought and prosecuted by the same plaintiff against the same defendant for causes of action which by law may be joined, to order the several suits to be consolidated into one action, if in their discretion it shall seem to them meet and proper so to do. This provision is re-enacted in the Revised Statutes, (vol. 2, p. 383, § 36.) Its object was to prevent oppression by the unnecessary accumulation of costs. It does not require that a defence on the merits should be shewn to entitle the party to the interposition of the court. The motion is granted, but without costs.

ALBANY,
January, 1830.THE PEOPLE, on the relation of T. Gay, vs. THE JUDGES OF
MONROE COMMON PLEAS.The People
v.
Monroe, C. P.

MOTION for a mandamus. A *scire facias* was issued from the Monroe common pleas against the relator on a recognizance of bail as the manucaptor of Stephen Porter. It was served by a deputy sheriff, who indorsed a return on the writ in these words: "Served the within on the defendant by leaving a copy thereof marked copy, subscribed J. K. Livingston by Mr. Noyes, Dep'y. at the dwelling house of Jas. P. Fitch, being the last place of residence of the said Thomas Gay within the state, (signed) Jas. K. Livingston. Shff. M. Noyes, U. Shff." On the return of the writ, the plaintiff filed a declaration and entered a rule that the defendant appear and plead. The relator applied to the common pleas to set aside the plaintiff's proceedings for irregularity on the ground, that the defendant had not resided in this state since the commencement of the suit, which applications was denied, and a mandamus was now asked for, directing the common pleas to grant the motion.

A *scire facias* against bail, removed from the state, served by leaving a copy at the last usual place of residence of the bail within the state, is a good service.

H. Gay, for relator, insisted that the statute, (1 R. L. 324, § 7,) under which the proceedings had been had relative to the leaving of a copy of the *scire facias* at the last place of abode of the defendant, was intended solely to increase the chances of bringing knowledge home to bail of proceedings instituted against them, and not to change the law as to the service of process or the practice of the courts. That notwithstanding this statute, a plaintiff could not proceed in a suit on *scire facias* until a return of *scire feci* or of two *nihilis*; that the practice of the court was uniform in this particular, and that a service of a *scire facias* in the manner pursued in this case had never been considered by the bar as authorizing a plaintiff to proceed in his suit, nor had it been sanction by the court.

ALBANY,
January, 1830.

Cook
v.
Tousey.

By the Court, MARCY, J. It is true that this statute has never received a construction, and it is singular that a question should not have been raised upon it until this late day. The general practice undoubtedly is, to obtain *two nihilis* returned, when a return of *scire feci* cannot be had ; yet when a statute points out a particular mode of service of process, and that has been complied with, we are not disposed to say that such service is not good, especially when it is more probable that process thus served would be more likely to come to the knowledge of the party to be affected by it, than by the common law mode of service. The motion for a mandamus is therefore denied.

COOK and others vs. TOUSEY.

Where the principal and interest due on a bond exceed the penalty, the jury, on the trial of a cause, ought to give the excess in damages. If, however, nominal damages only are assessed by a jury, the excess cannot subsequently be taxed by the taxing officer and included in the costs, as is the practice where the judgment goes by default or confession.

ALLOWANCE of interest beyond penalty of bond. At the last Saratoga circuit, a verdict was taken for the amount of the penalty of a bond declared on in an action of debt, and for nominal damages. The bond was dated 22d January, 1806, in the penal sum of \$180, conditioned for the payment of \$90 with interest. The principal and interest exceeded the penalty \$60,95, and a question was now submitted whether the taxing officer was authorized to tax the same with the costs of the suit.

A. Brown, for plaintiff.

O. G. Otis, for defendant.

By the Court, MARCY, J. Where the principal and interest due on a bond exceed the penalty, the jury ought to give the excess in damages. (Buller's N. P. 178.) This rule was adopted by this court in *Smedes v. Houghtaling*, (3 Caines' R. 48,) where a verdict rendered for the full amount of the principal and interest of a bond, though the interest exceeded the penalty, was permitted to stand. The plaintiff here has erred in taking a verdict for nominal damages only, if he wished to recover beyond the penalty of the bond ; he

should have asked an assessment of damages by the jury for the detention of the debt, and is not now entitled to have them allowed in the taxation of the costs. Where the judgment goes by default or confession, and the interest exceeds the penalty, the practice is for the taxing officer to allow the excess or tax the damages and include them in the costs, (2 Saund. 107, n. 2; 3 Caines, 40, n. a.;) but this cannot be done where a verdict has been taken, and damages have already been allowed by the jury.

ALBANY,
January, 1830.

Champlin
v.
Pierce.

CHAMPLIN vs. PIERCE.

MOTION for security for costs. This was an ex parte application to the court for a rule that the plaintiff file security for costs, on the ground that the plaintiff, since the commencement of the suit, had become insolvent, and had been discharged under an insolvent act.

Application for security for costs, if made to the court, must be on notice to the plaintiff.

By the Court, SAVAGE, Ch. J. This application is made under the provisions of the Revised Statutes, (vol. 2 p. 620.) By the third section of the title relating to this subject, an order to file security for costs may be made by the court in which the action is pending, or by any judge thereof in vacation. When the application is to the court, it should be on notice to the plaintiff, which, not having been given in this case, the order will not be granted by the court; but application may be made to either of the judges at chambers, who will grant an order that the plaintiff file security for costs within twenty days after service of the order, to shew cause on the first day of the next term; and in the mean time all proceedings on the part of the plaintiff be stayed. This is the practice which we have concluded to adopt in cases of this kind.

If made to a judge at chambers, the order will be that the plaintiff file, security in twenty days, or shew cause on the first day of the next term.

ALBANY,
January, 1830.

Beekman
v.
Lansing.

BECKMAN vs. J. LANSING.

To constitute a *levy* under an execution, the officer should enter upon the premises where the goods of the defendant are, and take actual possession of them. The goods should be brought within his view, and subjected to his control; and it seems that an inventory should be taken of them. He should assert his title to them by virtue of the execution, and his acts should be public, open and unequivocal, and nothing should be done by him to cast concealment over the transaction. It seems, that the acts of the sheriff, as to the asserting of his rights and the divesting of the possession of the defendant, should be of such a character as would subject him to an action as a trespasser, but for the protection of the execution.

Where a sheriff received an execution, and went with it in his pocket to the house of the defendant, but took no inventory and did no act to enforce the execution for eleven months afterwards, not even apprising the defendant of the fact, it was held that no such levy had been made as would debar the landlord of the house occupied by the defendant from claiming the rent due to him, although it accrued *subsequent* to the pretended levy.

Notice to the sheriff of rent due to the landlord is not necessary *previous to the removal* of the goods from the demised premises; if given even *after a sale*, so that it be before the money is paid over to the plaintiff in the execution, it is good.

CLAIM of landlord for rent to be paid out of the proceeds of an execution. On the 1st November, 1828, a *feri facias* was issued in the above cause, and delivered to the then sheriff of Albany for the sum of \$613,14, returnable on the 16th February then next. In the month of December, 1828, the sheriff went to the dwelling house of the defendant in the city of Albany, and there, as he states, made an actual and bona fide levy upon the *household furniture* and other property of the defendant, by virtue of the execution. What acts he did, however, as constituting a levy, he does not shew. Soon after, the property was advertised for sale, which was postponed from time to time for want of bidders. On the 23d October, 1829, the execution was returned unsatisfied for such want of bidders. On the *fourteenth* of November following, the household furniture of the defendant was sold by virtue of a writ of *venditioni exponas* issued in this cause. It brought the sum of \$590. At the same time other personal property of the defendant, found in another tenement and not in his dwelling house, was sold, and brought about \$600. From the proceeds of the sale, the execution in this cause was satisfied, and the amount paid over to the plaintiff on the *twenty-sixth* day of November. The residue of the proceeds was applied to the payment of one other execution, and towards satisfaction of a third, delivered to the sheriff of Albany subsequent to the execution in this cause.

The dwelling house occupied by the defendant was rented to him by an agent of the owners, who reside in New-York and Troy, for one year from the first day of May, 1828, at a

rent of \$500; which letting was renewed for another year, from the first of May, 1829, at a rent of \$450, payable quarterly on the first days of August, November, February and May then next ensuing. The agent of the owners was not apprised that the property of the defendant was levied upon by virtue of executions, until after the 1st November, 1829. On the *tenth* of November, notice was given to the sheriff by the attorney of the landlords, that the sum of \$406,04 was due for rent accrued within the year then last preceding, and requiring it to be paid before the goods were removed and sold; and *after* the sale and *before* the payment of the proceeds to the plaintiffs in the executions, he gave the sheriff a memorandum in writing of the items and amount of rent claimed, viz. \$68,54, due the 1st of February last; \$112,50, due the 1st of May last; \$112,50, due the 1st of August last; and \$112,50, due the 1st of November last. The attorney of the landlords, in the affidavit upon which this motion was made, (a copy of which was served on the plaintiff in this cause and on the sheriff,) stated that he was *informed* by the defendant, which information he believed to be true, that the sheriff never took an inventory of the goods in the dwelling house, and had no inventory of them until furnished by the defendant on or about the tenth day of November last; that the sheriff, with the knowledge of the defendant, had not been at his house to make a levy until November last; and that an *actual levy* had never been made on the goods in the dwelling house.

In answer to the facts presented in behalf of the landlords, the sheriff admitted that three or four days previous to the sale of the property, the attorney of the landlords apprised him of a claim upon the property for rent, but stated no particulars; and that on the *sixteenth* day of November, *after the removal* and sale of the property, the attorney gave him a notice in writing, specifying the claim and the amount of rent demanded. To the facts stated, as derived from the information of the defendant, the sheriff makes no answer. On the part of the plaintiff, it was shewn that a return of the execution issued in this cause was enforced by attachment, and that shortly after its return, a *venditioni exponas* was issued, on which the property was sold. The amount of rent due was not denied or controverted.

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On this state of facts, a rule was asked that the sheriff pay over to the landlords the sum demanded as rent.

S. Cheever, for landlords, admitted that the landlords can claim only such rent as was due at the time of the *taking* of the goods, but contended that the goods in question were not taken until *after* the rent claimed had become due; for although the execution in this cause was delivered to the sheriff on the 1st November, 1828, the goods in the demised premises were not *taken*, and were not in the custody of the law, until after the 1st November, 1829. In *Haggerty v. Wilber*, (16 Johns. R. 288,) the court intimate that to constitute a levy, an inventory should be taken of the goods where there is not an actual seizure of them, and that the sheriff should have them under his view and within his power. The court have a right to presume in this case that no inventory was taken at the time of the levy, and that even the defendant himself was ignorant of the pretended levy until after the 1st November, 1829. The goods, therefore, should not be considered as *taken*, within the meaning of the statute concerning distresses for rent, until they were removed to be sold on the fourteenth day of November, which was subsequent to the notice.

Notice of rent being due was given both before and after the sale of the property taken from the demised premises.

J. Sanders, jun. for plaintiff. The plaintiff should not have been made a party to this motion, and is entitled to costs for being brought into court. The property of the defendant sold for an amount more than sufficient to satisfy both the execution and the rent. If the proceeds of the property sold, not taken from the demised premises, be applied to the execution in this cause, sufficient is left in the hands of the sheriff to satisfy the rent.

W. Esleeck, for sheriff. It appears from the affidavit of the sheriff that he made an actual and bona fide levy on the property of the defendant previous to the return of the execution, and previous to the accruing of any rent claimed. The landlord cannot claim rent accruing after the levy. (18 Johns. R. 1.)

The notice of rent being due, given previous to the sale, was insufficient. The sheriff was apprised three or four days before the sale that there was a claim for rent; but to whom owing, when accrued, and the amount due, was not stated. The landlord must give notice of these particulars to the sheriff, or he is not bound to regard the claim. (11 Johns. R. 85.) The notice subsequent to the removal and sale of the goods was too late. The statute on this subject, (1 R. L. 437, § 12,) requiring the rent to be paid previous to the removal of the goods from the demised premises, contemplates notice to be given previous to such removal.

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v.
Lansing.

By the Court, MARCY, J. By the act concerning distresses, rents, &c. it is enacted that no goods or chattels upon any demised premises shall be liable to be taken by virtue of an execution, unless the party at whose suit the execution is issued shall, *before the removal* of such goods, pay the rent due, not exceeding a year's rent. This section of our statute is a transcript of 8 Ann. ch. 14, § 1. under which it was formerly holden in England, that to entitle a landlord to his motion against the sheriff, he must have made a demand, and given notice to the sheriff of the rent due before the goods were removed, (1 Strange, 97, 214;) and some cases in our court seem to sanction this construction of the statute. The cases in Strange have however been overruled. The doctrine of them was first questioned in *Smith v. Russell*, (3 Taunton, 400.) and subsequently in *Arnett v. Garnett*, (3 Barn & Ald. 440.) It was held that notice to the sheriff, even after the removal of the goods, provided it was given before the sheriff had actually paid over the money, was sufficient to found a motion to the court. Notice to the sheriff of the rent due previous to the removal of the goods is not necessary. The statute, in terms, does not require it; and to give a construction to it requiring such notice previous to a removal would, in most cases, defeat the very object and intent of the statute. Notice, even after a sale, provided it be before the money is paid over to the plaintiff in the execution, is good. That such notice was given in the present case is conceded.

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The landlord, however, where the goods of his tenant are taken in execution, can claim of the sheriff only the rent due at the time of the taking of the goods; he cannot demand rent which accrues after the levy of the execution, and while the goods remain on the premises in the possession of the sheriff. (*Trappan v. Morie*, 18 Johns. R. 1.) The execution in this case was issued in November, 1828, and the sheriff, according to his affidavit, made an actual and bona fide levy on the goods upon the demised premises in the succeeding month, at which time no rent was due. The goods were not removed from the premises until the 14th November, 1829, at which time upwards of \$400 rent had accrued. It becomes important then to determine what constitutes in law a *levy* under an execution, and whether such a levy was made in the present instance.

What shall constitute a levy is not very distinctly defined in the reports of cases in this court. In *England*, the officer enters upon the premises in which the defendant's goods are, and leaves one of his assistants in possession of them, or he causes an inventory to be taken and removes them. (1 Archb. Pr. 293. 1 Maule & Selw. 711. 5 Taunton, 198.) We are not disposed to go this length, but are of opinion that the officer should enter upon the premises where the goods of the defendant are, and take actual possession of them, (if they are such of which possession can be taken.) The goods should be brought within his view, and subjected to his control, (*Haggerty v. Wilder*, 16 Johns. R. 288;) and it is proper also, if not necessary, that an inventory should be taken of them; the officer should assert his title to the goods by virtue of the execution; and we are inclined to think that his acts, as to the asserting of his rights and the divesting of the possession of the defendant, should be of such a character as would subject him to an action as a trespasser but for the protection of the execution; they should be public, open and unequivocal, and nothing should be done by him to cast concealment over the transaction. But it is not necessary that an assistant of the officer should be left in possession of the goods, or that the goods should be removed; they may be left in the custody of the defendant, at the risk

of the plaintiff or of the sheriff, or on obtaining, as is customary, a receiptor for their delivery on demand.

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v.
Lansing.

Tested by these rules, was there a levy in this case in the month of December, 1828? The sheriff says that he then made an *actual and bona fide levy*, but he omits to state the acts he did constituting such levy. This he was called on to do in this case by the affidavit on which this motion is founded, with a copy of which he had been served; in which it is stated, on the information of the defendant, (in the truth of which information the attorney of the landlords expresses his belief,) that the sheriff had not been at the house of the defendant, to the knowledge of the defendant, to make a levy, until the month of November, 1829, when, and not before, an inventory of the goods was made. To this charge an answer should have been made, and the acts detailed which induced the sheriff to say that he had made an actual and bona fide levy, so that the court might have judged whether or not they amounted to such levy. Not having done so, the fair intendment is, that the allegations could not be denied; and if so, the sheriff erred in supposing that merely going to the house of the defendant with an execution in his pocket, without even apprising the defendant that he had come to make a levy upon his goods, was an actual and bona fide levy, defeating the rights of the landlord.

A *secret* levy on goods left on the premises in the possession of the defendant in the execution, and no act done to give notoriety to it, or to bring it to the knowledge of the landlords of the premises, of whom the defendant is a tenant for nearly a year afterwards, cannot have the effect to debar the claim of the landlords for rent. It would be unjust it should be so, and particularly in the present case, where the demised premises were re-let to the defendant, and the whole of the rent claimed accrued subsequent to the time of the pretended levy. If effect were given to the levy, the landlords would be entirely deprived of the *lien* which they had a right to calculate on as their security for the rent. This cannot be; the proceeding has operated as a fraud upon the landlords, and cannot be sustained. The motion of the landlords is therefore granted.

Mr. Justice SUTHERLAND, gave no opinion in this case.

ALBANY,
January, 1830.

Matter of
4th Avenue.

In the matter of the application of the MAYOR, &c. of New-York relative to the opening of the *Fourth Avenue* from Broadway to Twenty Eighth street in the ninth and twelfth wards, and continuing *Sixteenth* and *Seventeenth* streets.

A report of commissioners of estimate and assessment in the city of N. Y. relative to the opening of streets, will not be confirmed, if, in the opinion of this court, the measure is premature; and will cost more than the proprietors of the adjacent land will be benefited by the operation.

Owners of property can be assessed only for the benefit and advantage which they will derive from the improvement, over and above their loss and damage; and such benefit ought not to be speculative and distant, depending upon remote and uncertain contingencies, but should be substantial, certain and capable of being realized within a reasonable and convenient time.

THE report of the commissioners of estimate and assessment in relation to the contemplated measure being presented for confirmation, objections were interposed on behalf of *Cornelius T. Williams*, the owner of the principal part of the lands required for the purpose of opening the avenue and continuing the streets, whose benefits were estimated at \$19,275. The facts of the case, adverted to in the opinion of the court, supersede the necessity of here stating them. The case was argued by

T. L. Ogden & B. F. Butler, for the objector.

R. Emmet, for the corporation.

By the Court, SUTHERLAND, J. Various objections are made by Mr. Williams to the confirmation of the reports made by the commissioners of estimate and assessment in each of the above cases. But it is unnecessary for us to express an opinion upon the specific objection in each case, as one of the grounds on which the confirmation of the report is opposed is applicable to all the cases, and is, in the opinion of the court, such as to render it proper to send them all back to the commissioners for re-consideration.

Mr. Williams owns by far the largest portion of the property through which these streets are to run, and a great portion of the expense of the operation is imposed upon him. He is assessed for benefit, over and above the loss of the ground taken for the streets, about \$20,000. He has produced the affidavits of several respectable and intelligent men, who appear to be well acquainted with the value of real estate in this part of the city of New-York, and to be capable of estimating correctly the effect of the proposed improvements. They all concur in the opinion that the opening of these streets will at present be of no advantage to Mr. Williams;

that if they were the proprietors of his estate, they should not wish the streets opened, under existing circumstances, if it could be done without any expense to them; and the reasons which they assign in support of these opinions appear to the court fully to justify them. They state that the property of Mr. Williams, through which these streets are to run, is high ground, being from ten to twenty feet above the level of the streets as they are directed to be dug out; that the expense of digging out the streets, and of reducing his lots to the level of the streets, if he can get nothing for the surplus earth, will be enormous; that ordinarily there is a demand for surplus earth for the purpose of filling in the low grounds on each side of the island, but that at present there is no such demand, owing to a depression in the value of real estate generally in the city, but particularly in the outer wards; that there is at present no demand for lots in that part of the city; that there are now more than 6000 vacant lots south of Sixteenth street; that the market is over stocked, and sales are made with great difficulty even at reduced prices; that it will take a large portion of the estate of Mr. Williams, if he is compelled to sell it at present, to enable him to raise the amount of his assessment, whereas if these improvements can be delayed for a few years, Mr. Williams will be enabled, in all probability to dispose of his surplus earth to advantage, and, if necessary, to sell his lots at a fair price.

We are strongly of the opinion, from the evidence before us, that the opening of these streets is premature; that it will cost more than the proprietors of the adjacent land will be benefited by the operation. Acting as commissioners, we do not claim the right to control the discretion of the common council in relation to the improvements which the interests of the city may require to be made; but we are bound to see that the expense of these improvements is fairly and justly assessed, according to the spirit of the act under which the assessments are made. The opening of the streets in question may promote the prosperity of the city at large: upon that subject we have no right to review the decision of the corporation; but when the commissioners of estimate and assessment say that Mr. Williams, or any other individual,

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will be benefitted by the operation \$20,000 beyond his damage, it is our duty, when a confirmation of the report is asked for, to look into the evidence, and see whether it supports the decision of the commissioners, and if we are satisfied that the benefit to the individuals affected by the improvement has been greatly overrated, we cannot confirm the report, although the effect of such refusal to confirm may be to defeat the improvement. If the benefit to the owners of property within the range of assessment is less than any contemplated improvement will cost, they cannot upon any just construction of the act, be made to pay the whole expense. They can be assessed only for the *benefit and advantages* which they will derive from the improvement, over and above *their loss and damage*; and such benefit and advantage ought not to be speculative and distant, depending upon remote and uncertain contingencies, but it should be substantial, certain and capable of being realized within a reasonable and convenient time.

The weight of evidence in this case certainly is, that the benefit of Mr. Williams from the opening of the street in question has, according to these principles, been greatly overrated. We therefore direct the report to be returned to the same commissioners for re-consideration and correction.

D. WOOD vs. T. M. WOOD.

In an action of debt on bond conditioned for the payment of an annuity, after judgment, it is not necessary to have a *scire facias* to warrant an execution for subsequent arrears. An execution may be sued out without a *scire facias*, but it seems it would be well to specify in the direction, particularly, the arrears claimed.

EXECUTION for annuity secured by bond. A judgment was entered in this case at the last May term for \$1000, the penalty of a bond, and \$55,89, the costs of suit. The bond bears date 22d June, 1816, and is conditioned for the payment of \$80 annually to the plaintiff during her natural life. On the 15th May, the attorney for the plaintiff issued a *testatum fieri facias* to the sheriff of the county of Onondaga, in the usual form, and by an indorsement on the execution, directed the sheriff to collect \$325,33, but to allow on account of the same a certain payment made by the defendant. On

the 3d August, the sheriff returned that he had made the money directed to be levied. On the 29th October, the attorney for the plaintiff issued an *alias testatum fieri facias* on the above judgment, and by an indorsement on the execution, directed the sheriff to collect \$80 and the interest thereon from the 22d June, 1829, besides his fees. It appeared that the sum directed to be levied on the *first* execution was for the balance of the annuities which had accrued up to and including the annuity due in June, 1828, and the costs of the suit; and that the amount directed to be levied by the *second* execution was for the annuity due in June, 1829.

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The defendant moved to set aside the execution for irregularity, insisting that the execution should have been an execution *pro residuum*.

T. M. Wood, defendant in pro per.

S. L. Edwards, for plaintiff.

By the Court, SAVAGE, Ch. J. The question here, if any, is not whether the execution should have been for the residue, but whether the plaintiff had a right to sue out an execution for subsequent arrears, without proceeding by *scire facias*. In England a bond conditioned for the payment of an annuity, is holden to be within the statute, requiring a suggestion of breaches on the record. (2 Burr. 820. 5 T. R. 538. 8 T. R. 126.) Our statute, however, excludes bonds conditioned for the payment of money, and a *scire facias* therefore is not necessary. An execution may be sued out for arrears accruing subsequent to the judgment without a *scire facias*, at any time within a year after they are incurred, or even afterwards, if a writ of execution has been previously sued out and properly continued down, in conformity to the practice of the English courts as it existed previous to the time when it was holden that a bond, conditioned for the payment of an annuity, was within the statute, 8 and 9 William 3, c. 11, § 8. (2 Black. R. 843. 1 H. Black. 297.) It would be well, however, when an execution issues for subsequent arrears, that the direction to the sheriff should specify par-

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ticularly the arrears claimed, as for instance, "levy \$80, the annuity due on the 22d June, 1829, according to the condition of the bond declared on in this cause." The motion in this case is denied with costs.

ANON.

The order for allowance for classical studies to clerks of attorneys must be obtained at the commencement of the term of clerkship. If omitted, a judge's order should be obtained in vacation.

AN application was made to the court, for a special order for the examination of a candidate for admission as an attorney, on the ground that a regular order had not been obtained for an allowance for classical studies at the commencement of his term of clerkship.

THE CHIEF JUSTICE announced, that for the future the court would strictly adhere to the rules established as to the admission of candidates for examination. That if a person commencing a clerkship in an attorney's office is entitled to an allowance for classical studies, such allowance must be ascertained and settled by one of the judges *at the commencement of the clerkship*, and will not be inquired into by the court when application is made for examination. If special circumstances exist, excusing the omission, application should be made to one of the judges in vacation, and not to the court during term.

★ ONTARIO BANK VS. PETRIE.

Where in a notice of non-payment dated on the day that a draft falls due, it is stated that the draft was protested on the evening before for non-payment, and that the holders look to the endorser for payment, it is right and proper to submit the question to a jury, whether or not the defendant has been misled.

THIS was an action of assumpsit, tried at the Oneida circuit in April, 1829, before the Hon. NATHAN WILLIAMS, one of the circuit judges.

The defendant was sued as the third endorser of a draft, drawn by a firm of the name of Sprague & Dann on R. & G. Bartow, and accepted by them for \$350, dated 28th March, 1828.

A draft falling due on *Sunday* may be demanded on the preceding day.

4 27600 588.

1828, and payable five months after date. The draft fell due on the 31st August, which being a *Sunday*, it was presented for payment on the 30th August, at New-York, where the acceptors resided, and not being paid, notice of the demand and non-payment was put into the post-office on the same day or the next morning; the mail then closed at 3 P. M. after which hour the demand was made. The notice directed and sent to the defendant was in these words: "New-York, August 30, 1828. *Sir—Please to take notice that Sprague & Dann's draft on Rob't & Geo. Bartow, and accepted by them for \$350, endorsed by you, was last evening protested for non-payment, and that the holders looks to you for the payment thereof. Yours, &c. J. G. B., Notary Public.*" (The words in *italic* were printed.) It was conceded on the trial that the defendant was an endorser on other paper between the same parties, but not for the precise amount, nor of the same date, nor which fell due in the same month with the draft in this case. The counsel for the defendant objected to the sufficiency of the notice, which objection being overruled, he requested the judge to charge the jury that the notice was calculated to mislead the defendant, and was, in law, not sufficient to charge him. The judge instructed the jury, that if they believed that the defendant was misled by the notice given to him, they ought to find for him; otherwise, their verdict should be for the plaintiffs. The defendant excepted. The jury found for the plaintiffs. A motion was now made to set aside the verdict.

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D. Burwell & J. A. Spencer, for defendant. According to the notice, the demand was made *two* days previous to the draft falling due. It was the province of the judge and not of the jury to pass upon the sufficiency of the notice; the evidence consisting of a written document, the import of it was matter of law, and not of fact, (1 T. R. 180;) he, therefore, should not have submitted to the jury the question whether or not the defendant was misled. Demand of payment must be made *when* a note or bill is due, and not *before* it is due. The notice in this case stating the demand to have been made before the maturity of the draft the defendant

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had a right to disregard it. This is not like the case of an *informal* notice, where the party would be put on enquiry.

C. P. Kirkland, for plaintiffs. If the notice be sufficient to put the party on inquiry it is enough. (2 Johns. C. 338.) No particular form of notice is necessary; that part of it in this case which states the draft to have been *protested* was superfluous, the party being apprised that the holders looked to to him for payment. Whether the defendant could have been misled by the notice was properly submitted to the jury. Such question was submitted in the case of *Smith v. Whiting*, (12 Mass. R. 6,) where the notice was grossly defective. The jury here were warranted in saying that the defendant could not have been misled.

By the Court, SAVAGE, Ch. J. The only difficulty in this case is in the notice of non-payment. The note was due on the *thirty-first* day of August, 1828, which was *Sunday*, the demand was made on Saturday, the *thirtieth*, and notice sent by the first mail. The notice, dated the *thirtieth*, states payment, was demanded *last* evening instead of this evening. The judge was right in submitting to the jury the question, whether the defendant was misled. The case of *Reedy v. Seixas*, (2 Johns. C. 337, 8,) is similar in principle; there, the note was misdescribed in the notice, and the court said it was sufficient to put the defendant on enquiry, and that it was incumbent on him to shew circumstances to mislead him, such as other notes endorsed by him. Here there were other notes, but none due the *same month*. In *Smith v. Whiting*, (12 Mass. R. 6,) there were two errors in the notice: the maker's name was written *Cushing* instead of *Cushman*, and the note was said to have fallen due before the days of grace had expired, but the court considered the errors immaterial. In this case, it was properly left to the jury to say whether the defendant was misled, and they have found that he was not misled. The demand was made on the right day, and the notice was in due season. The stating in the notice that the draft was protested for non-payment on the evening before it fell due, could not prejudice the defendant.

New trial denied.

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PELTIER vs. J. E. COLLINS.

ERROR from the New-York common pleas. J. & E. Collins sued Peltier in the common pleas, in an action of assumpsit to recover damages for the breach of a contract in not receiving and paying for a quantity of rice alleged to have been sold by the plaintiffs to the defendant. The plaintiffs recovered a verdict and entered judgment, which was brought into this court by writ of error, on a bill of exceptions taken at the trial.

One J. J. Werth, a produce broker in the city of New-York, on the 11th April, 1826, shewed to the defendant several samples of rice which he had obtained of the plaintiffs, and for which they asked three and a quarter cents by the pound. He shewed him a sample of two parcels, one marked H. G. containing 76 tierces, and the other G. containing 73 tierces, which the defendant said he would take. The defendant asked the broker if he thought he could not get the rice for three and one eighth cents per pound, who answered that he thought the plaintiffs would not take less than three and one quarter cents per pound, and added that the mark H. G. was all of one crop and from one plantation, and would be warranted as to quality by the plaintiffs. The defendant said he would examine it in the *cask*, and satisfy himself as to the quality, if he made the purchase; that he must have his own terms if he bought it; that if the plaintiffs would give him the choice to take four months credit, or three per cent. discount for cash, that witness might make the purchase. The defendant however reserved to himself the right to examine the rice in the casks, and to approve or disapprove of the bargain, as he should think fit on such examination. The broker went to the plaintiffs, and stated that he had found a purchaser for the two parcels H. G. and G., provided they would sell on a credit of four months or three per cent. discount for cash, at the option of the purchaser. The plaintiffs, on being informed who was the purchaser, said he should

A warranty for the quality of an article in the sale of chattels when made is an essential part of a bargain, and should be stated in the note or memorandum; the omission of it renders the contract void, and *parol* evidence is inadmissible to take the case out of the operation of the statute of frauds.

The object of the note or memorandum is not merely to prove that there was a bargain, but to shew what it was—at least the extent and entirety of the consideration for the promise, for the breach of which the action is brought.

There is no contract if there be a material difference between the note of the bargain delivered by a broker to the vendee and that delivered to the vendor.

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have the rice. The broker observed that he had stated to the defendant that the plaintiffs would warrant the parcel of 76 hogsheads, upon which they replied that they would warrant the whole. One of the plaintiffs wrote a memorandum of the agreement in a book of the plaintiffs, which the broker signed. The broker went to his own office, and wrote and signed a memorandum of the bargain for the purchase of the rice in his own memorandum book, of which he gave a copy the next morning to the defendant at the defendant's office. The book in which the plaintiffs wrote the memorandum was entitled, "Memorandum book of J. G. Collins and son." The memorandum was written on the 40th or 50th page from the beginning of the book, (the intermediate pages being written up with entries of sales and purchases in a similar form to the entry in this case, made from time to time, and subsequent entries were made in like manner,) in the following words: 'New-York, April 11, 1826. Sold F. Peltier, at 4 months or 3 pr. ct. for cash, H. G. 76 tierces rice, and G. 73 tierces rice \$3½ per 100 lb. pr.] J. J. Werth. For acct. J. H. Glover and Rice, No. 71. Schr. Garguer. In acct. J. F. & Co. I certify the above to be correct, (signed) Jno. J. Werth." The entry in the broker's book was in the following words: "New-York, April 11, 1826. Purchased from J. G. Collins and son by order and for account of F. Peltier, Esq. H. G. 76, G. 73—149 tierces rice, as per samples, at 3½ cents, 4 mos. credit or 3 pr. ct. disct. for cash, at the option of the buyer, with guaranty of the quality, (signed) Jno. J. Werth, Broker." When the broker handed the copy of the memorandum to the defendant, he objected to it because the broker had not inserted in it that the defendant was to have the privilege of looking at the rice in the cask before making the purchase. The broker told him that the quality of the rice was warranted by the plaintiffs, and therefore there could be no difficulty about it. The defendant made no reply, neither saying that he was satisfied or dissatisfied. Within a day or two after the purchase thus made, the defendant went with the broker to examine the rice; he approved of the parcel marked H. G., and told the plaintiffs he would take it, but disapproved

of the other parcel, and said he would not take it. On the 25th April, one of the plaintiffs informed the defendant that he was ready to comply with the contract on his part, and that if the defendant did not take away the rice on that day, they, the plaintiffs, would sell it on the succeeding Saturday, on the defendant's account. The defendant said he did not consider the rice as his, and that he would not take it. On the 2d May it was sold at auction at a loss of \$215,78, for the recovery of which the action was brought.

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The declaration contained several counts. The first count set forth that on, &c. at, &c. the defendant bargained for and bought of the plaintiffs, and the plaintiffs, at the special instance and request of the defendant, then and there sold to the defendant a large quantity of rice, to wit, 149 tierces of rice, amounting to 88,153 pounds net weight, at the rate of \$3,25 per 100 pounds, to be delivered by the plaintiffs to the defendant, and to be paid for in four months thereafter, or to be paid for in cash, with three per cent. discount or deduction from the said price, at the option of the defendant; and in consideration thereof, and that the plaintiffs, at the like special instance and request of the defendant, had then and there undertaken and faithfully promised the defendant to deliver the rice to him the defendant, he, the defendant, undertook and then and there faithfully promised the plaintiffs to accept the rice of and from them, the plaintiffs, and to pay them for the same in four months thereafter, or to pay them in cash, after making the discount or deduction aforesaid. Then follows an averment of a readiness on the part of the plaintiffs to deliver, &c. and a breach on the part of the defendant &c. The second count was similar to the first, setting forth the special contract. The third count was for goods bargained and sold, without delivery. Then followed the common counts for goods sold and delivered, quantum meruit and the money counts. The defendant pleaded the general issue.

On the trial of the cause, the reading in evidence of the memorandum entered in the plaintiff's book, and signed by the broker, was objected to by the defendant, but allowed by the judge. After the evidence for the plaintiffs was closed, the defendant moved that the plaintiffs be nonsuited, because,

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1. The memorandum in the plaintiff's book not containing the whole agreement as made by the broker, particularly the names of the plaintiffs as sellers of the rice and the warranty as to the quality thereof, was not binding upon the defendant; 2. That the memorandum made in the broker's book was the only memorandum upon which the defendant could be charged, if any, and that was not declared upon. The motion for a nonsuit was denied by the judge, who charged the jury that the memorandum in the plaintiff's book was in law a sufficient note or memorandum in writing of the contract or agreement, and the signing by the broker was sufficient to charge the defendant; that the memorandum was not void or invalid by reason that the names of the plaintiffs were not inserted therein, the same being entered in the sale book of the plaintiffs, in which the sales and purchases made by them from time to time were entered; nor was the same void or invalid because it did not contain the whole agreement in setting forth the warranty, it being competent to the defendant to shew and prove such warranty as part of the agreement, although not contained in such memorandum, and that the memorandum was binding upon the defendant, and the plaintiffs were entitled to recover unless the jury should be of opinion that the broker, in making the agreement, had exceeded the authority given him by the defendant; and that even in such case, if they should be of opinion that the defendant had subsequently ratified the agreement, the plaintiffs were entitled to recover. The jury found for the plaintiffs, with \$233,84 damages, and six cents costs. The defendant excepted to the charge and to the various decisions made by the judge.

W. Slosson, for plaintiff in error. The action, if sustainable, must be supported under the special counts, which are founded wholly on the memorandum in the plaintiff's book, which is void within the statute of frauds. A memorandum must state the contract with reasonable certainty, so that the substance of it can be made to appear and be understood from *the writing itself*, without having recourse to parol proof. (3 Johns. R. 399.) This memorandum did not contain the

names of the sellers, which is indispensably necessary. (4 Bos. & Pul. 252.) It omitted the warranty, an essential and vital part of the agreement. It was entirely different from the copy given the defendant: this is a fatal objection. (5 Taunton, 786. 1 Holt's R. 172.) It did not contain the whole agreement. (3 Johns. R. 210 5 East, 10.) The entry in the broker's book was the only proper entry of the bargain. (Starkie on Ev. pt. 4, p. 614.) If the evidence of the warranty was admissible, the plaintiffs should have been nonsuited for the variance between the contract as proved and declared on. (1 Chitty's Pl. 299, 300, 340. 2 East, 145. 7 Cowen, 85. 18 Johns. R. 451. 8 Cowen, 35. 4 id. 406.)

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G. Clark, for defendants in error. The authority of the broker to bind the defendant was submitted to and passed upon by the jury, and found against him; and their finding is conclusive upon that question. (3 Burr. 1921. 14 Johns. R. 484. 4 Johns. Ch. R. 699.)

The memorandum in this case has all the essentials required by statute to render it valid and binding, even within the decision in 3 Johns. R. 399. It is the *fifteenth* section of the statute of frauds which applies to this case, and it differs from the *eleventh* section. The latter requires the *agreement* to be in writing; the former is complied with if there be a *note* or memorandum in writing of the bargain. The consideration need not be stated, nor any thing beyond the fact of a sale; the particulars of the agreement may be proved by *parol*. (6 East, 307, 4 Wheaton, 91, n. 3 Starkie's Ev. 1048, n. g.) All that is required is a note or *memorandum*, importing an informal writing done on the spot, at the moment, in the hurry of commercial business. (14 Johns. R. 492. 13 Mass. R. 142.)

The memorandum being entered in the book of sales and purchases of the plaintiffs, kept expressly for such purposes, was equivalent to an actual signing, and, in this respect, this case differs most essentially from the case in 4 Bos. & Pul. where the memorandum was made in a common memorandum book, and was signed by the vendor only. The note in this respect was sufficient. (2 Bos. & Pul. 238. 2 Caines,

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117.) There was no necessity that the warranty should appear on the face of the memorandum, or, in others words, the mutuality of the contract need not appear. (4 Wheaton, 91, n.) There was no essential difference between the memorandum in the plaintiffs' book and the copy delivered the defendant; the only difference is as to the clause of warranty, which need not be stated. But even in this respect the memorandum in the plaintiffs' book shews it was a sale by sample which always amounts to a warranty. Suppose the vendee signs a note acknowledging the purchase and promising payment, and the vendor another acknowledging the sale and warranting the article, can it be objected that there is a variance in the two notes? The memorandum made *at the time* of the sale, and not an entry made *afterwards*, as here, in the broker's book, should be regarded as the note of the sale. There was no variance between the contract as proved and as declared on; the warranty was a distinct and collateral matter which need not be stated. (1 Chitty, 301. 1 Saund. 234, n. 2. 1 T. R. 645, 616.) If there was a variance the plaintiffs might recover on the third count. (1 Chitty, 304. 1 East, 194. 2 Chitty, 17. 4 Esp. 251. 7 T. R. 67.) The plaintiffs might also recover on the general counts, the contract having been in fact executed by the sale of the goods after notice, in which they acted barely as the agents of the vendee. (4 Esp. 251. 5 Johns. R. 395.)

Slosson, in reply. Where the agreement is reduced to writing, parol evidence of *further terms* is inadmissible, (Long, on Sales, 117, § 9; 4 Camp. R. 22;) the evidence of the warranty, therefore, ought not to have been received. As to the construction put upon the *fifteenth* section of the act; it is admitted the memorandum may be informal, but it must contain the substance, or the terms of the contract, and such was the decision upon this very section. (3 Johns. R. 399. See also 14 id. 487.) Parol evidence is inadmissible to *add* to the note or memorandum in writing. (4 Wheaton, 92, 3, in note.) If there was a warranty, the declaration should have stated, that in consideration the the plaintiffs would sell *and warrant* the property, the defendant agreed, &c.;

the warranty is a part of the consideration, and being omitted the variance is fatal.

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By the Court, MARCY, J. It is quite evident that the plaintiffs below could not recover on a contract without warranty, because the defendant never authorised the agent to make a contract of that description. The writing did not shew such a purchase as the agent was authorised to make or as he did in fact make. Did the judge err in allowing the warranty to be proved by parol?

This contract is within the 15th section of the statute of frauds, and to be binding must be in writing. Roberts says, that the written agreement or memorandum must set forth distinctly the terms of the contract or promise, either by its own contents and expression, or by direct reference to something extrinsic which may render it intelligible and certain. (Rob. on Frauds, 116.) In the case of *Brodie v. St. Paul*, (1 Vesey, jr.) Mr. Justice Buller, sitting for the Ld. Chancellor, said, "if the agreement is certain and explained in writing, signed by the parties, that binds them; if not, and evidence is necessary to prove what the terms were, to admit it would effectually break in upon the statute and introduce all the mischief, inconvenience and uncertainty the statute was designed to prevent." These views accord with those of Ch. J. Kent, in the case of *Bailey & Bogert v. Ogden*, (3 Johns. R. 419,) where he says, "the form of the memorandum cannot be material, but it must state the contract with reasonable certainty, so as the substance of it can be made to appear and be understood from the writing itself, *without having recourse to parol proof*." Lord Ellenborough says, in the case of *Baydell v. Drummond*, (11 East, 156,) "the statute excludes parol evidence." Lord Redesdale would not hear parol evidence to shew what was intended to be the term in a lease, by connecting the lease with an advertisement of the premises (1 Schoale & Le Froy, 22.) I find no case in which these authorities are questioned, and in my opinion, to question the principle upon which they are based would be, in effect, to annul the statute. If parol evidence were permitted to shew terms and conditions in a contract,

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other than such as are specified in the memorandum, all the mischiefs would result from such a rule that would be the consequence of a total abolition of the statute. The object of the memorandum is not merely to prove that there was a bargain, but to shew what the bargain was, at least the extent and entirety of the consideration for the promise on which the suit is brought.

Was that part which was omitted in this case, the warranty clause, one of the substantial terms of this contract? I cannot view it otherwise. In the case of *Powell v. Edmunds*, (12 East, 6,) it is said that a warranty as to the quantity of timber would vary the agreement contained in the written conditions of a sale. The warranty is almost as important a part of the contract as the price or the designation of the article sold, and equally so with what relates to the delivery or the credit. If we would avoid confusion, it should be recollected that we are not endeavoring to ascertain what is necessary to be stated in declaring upon a contract properly made, but whether a warranty is a substantial part of it. It often happens that a part only of a contract need to be set forth in the pleadings in a suit. (1 Chitty's Pl. 300.) Suppose the contract had been with warranty and the memorandum in the plaintiffs' sales book had been signed by the defendant, but the warranty clause omitted, and suppose the rice had been delivered and had proved to be of an inferior quality, could the defendant have shewn the warranty by parol? The authorities to which I have referred shew most abundantly that he could not. Is the rule of proof different where the memorandum is subscribed by the agent? Most certainly not. To shew that the defendant was bound by the contract made by his agent, the judge admitted parol evidence that there was a warranty, and the jury found that the agent had authority to make a contract with warranty; yet if the defendant had recognized the contract, it would have been to him a contract within the statute, and therefore void; or a contract without warranty, because he would have been confined to the written memorandum to shew its terms. In testing the authority of the agent, no contract but such as was available to the defendant should have been consid-

ered, and the judge should not have admitted evidence that the defendant could not have introduced in a suit on that contract.

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If the contract proved by parol is that relied on by the plaintiffs below, they can not recover, because it is within the fifteenth section of the statute of frauds: a material part of it, the warranty, being omitted in the memorandum. If they are proceeding, as they appear to be, on the memorandum made in the sale book, they cannot recover, because they are endeavoring to enforce a contract, or rather seek to recover damages for the breach of a contract made without the authority of the defendant below.

It is admitted on both sides that the memorandum in the plaintiff's sale book is the writing that is to take the sale out of the statute. That contains no warranty; the copy of the memorandum handed by the broker to the plaintiff did contain one. If a broker deliver a *bought and sold* note which materially differ, there is no valid contract. (1 Holt. R. 172.) Such was the case here, unless what the defendants contend is true, that the note entered in their sale book contains in effect a warranty, shewing, as they aver, that the sale was by sample, which implies a warranty that the article sold shall correspond with the sample. Though the allegation of this fact is repeatedly made in the argument submitted to us, yet I do not find it to be so in point of fact. The memorandum contained in the case discloses nothing to shew that the sale was by sample. If it is meant that the memoranda are alike because it is shewn by parol evidence that the sale was made in that manner, the defendants are met by the objection that the fact is not proved by the writing, and it is not permissible to shew it otherwise.

It is urged that the plaintiffs might recover on the general count for goods bargained for and sold. The objection to this position is two-fold; first, the contract is executory and the plaintiffs are proceeding for the damages they have sustained for the non-fulfilment of it; and secondly, they fail to prove in a proper manner a contract by which the defendant is bound. I think the judgment below ought to be reversed.

Judgment reversed.

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Anderson.

PUGSLEY vs. ANDERSON and others, commissioners of highways of the town of Harrison, in the county of Westchester.

A *certiorari* will not lie to a justice of the peace to bring up the proceedings had under the Revised Statutes concerning encroachments on highways.

In a proceeding of that kind the justice cannot pass upon the qualifications of the persons returned as jurors.

ERROR or *certiorari*. The *certiorari* in this case was directed to J. H. Smith, Esq. one of the justice's of the peace of the county of Westchester, in which, after a recital of a willingness to be certified of certain proceedings had before the justice on the complaint of I. Anderson, I. H. and C. C., commissioners of highways of the town of Harrison in the said county, against Richard Pugsley, touching certain pretended encroachments said to have been made on a certain highway in the said town, the justice was commanded to send to this court the written complaint and allegations of the commissioners produced and read before the justice, and the jury called to try the same; together with the written plea or answer of Pugsley thereto; the decision of the justice made on the trial; a full and true statement of the testimony produced before the justice and the jury; the inquisition made by the jury; and the judgment rendered for the costs therein, with all things touching the same as fully and entirely as they appeared, were had or might remain before him. This writ was tested in May, and returnable in August 1828.

The justice made a return to the *certiorari*, in which he stated that on the 25th June, 1828, on the application of the commissioners of highways of the town of Harrison, he issued a precept directed to a constable of the said town, requiring him to summon twelve freeholders to meet at a certain place on the 1st July then next, at 1 o'clock P. M., to make a jury to inquire whether any encroachment had been made, and by whom, on a certain public highway, (particularly describing it,) said highway being encroached upon, as alleged, by the fence on the north side thereof along the land occupied by Richard Pugsley in said town; and also requiring the constable to give notice of the time and place of the meeting of the freeholders to the commissioners and to Pugsley; which precept was delivered to a constable of the town of Harrison. On the 1st July, the constable returned the

precept to the justice, with a panel containing the names of twelve freeholders summoned by him. The commissioners and Pugsley appeared before the justice, and the freeholders being called, also appeared. When the first person named on the panel was about to be sworn by the justice to inquire into the encroachment alleged to have been made, the counsel for Pugsley proposed to inquire of him whether he had made up an opinion in relation to the encroachment. The counsel for the commissioners objected to the inquiry, and the justice decided that by the act under which the freeholders were convened, he, the justice, after issuing the precept to summon the freeholders, was only authorised to swear the freeholders and witnesses on the hearing, and had no power to hear or decide relative to the competency of the freeholders. No further objections being made, the persons named in the panel were sworn and affirmed by the justice to inquire whether any encroachment had been made, and by whom. The justice further certified the names of certain witnesses sworn by him, as well on the part of Pugsley as on the part of the commissioners, and stated that they were examined by the counsel of the parties before the freeholders, who, after hearing the proofs and allegations of the parties, stated that they found that the fence on the north side of the highway, along the land in the occupancy of Pugsley, was an encroachment on the said highway, and signed a certificate to that effect, as he, the justice, was informed and believed, but that the same was never in his possession or custody, that he had not a copy or record thereof, and that it was not in his power to state the contents thereof; that the same was taken by the commissioners and filed in the town clerk's office on the 3d July, 1828, where it remains, as he was informed and believed. He further certified, that the costs attending the inquiry were taxed by him, the justice, at \$6,19, (stating the items,) but that the same had not been paid to him by Pugsley, nor had he issued any process for the collection of the same.

The case came before the court on a notice served on the attorney of the plaintiff, that the same would be brought to a

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J. W. Tompkins, for defendants, insisted that there was no judgment before the court which could either be affirmed or reversed; that the acts of the justice were wholly ministerial and not judicial; that his authority was limited to the issuing of a precept to summon the jury, to the swearing of the jury and witnesses, and to the issuing of a warrant for the collection of the costs; that he had no power to decide the question raised on the inquiry, or any other question. He cited the case of *Nichols v. Williams*, (8 Cowen, 16,) in support of the principle that inferior jurisdictions must strictly pursue the authority under which they act, and cannot take any thing by implication. That the cause could be heard on the certiorari and return, although no assignment or joinder in error had been filed, he cited 15 Johns. R. 537; 16 id. 49; 1 Cowen, 23, 28, n. a; 8 id. 13; 1 Dunlap's Pr. 226, 228.

By the Court, SAVAGE, Ch. J. The justice was right in the opinion he pronounced, that after issuing the precept for summoning the jury he had no duty to perform on the inquiry except to swear the jury and the witnesses. In a proceeding under this statute he does not act judicially; he has no judgment to render, nor order of any kind to enter; if the costs are not paid in ten days, it is his duty to issue a warrant, not an execution, for their collection. He is of course to tax the costs, but he has not the custody of the certificate of the finding of the jury; and it seems to me he has no right to decide upon the qualifications of the jurors.

There is no judgment, order or proceeding of the *justice* to be affirmed or reversed. He did not hold a court under the fifty dollar act; he could exercise no powers but such as are given him by the statute relating to highways, under which the proceeding in question was had. The constable seems to have the selection of the jury, and the jury so selected, after hearing the proofs and allegations of the parties, are to make a certificate, which is to determine the fact of encroachment. The justice has no voice in the matter; he is not

even to record the finding of the jury; he is merely to administer an oath to them, and to swear the witnesses; and this power might as well have been delegated to any other officer (the town clerk for instance) as to a justice. The statute giving authority to the justice to administer oaths does not confer the right of judgment upon the qualifications of the jurors, and no such power is given by the statute. I am, therefore, of opinion that the certiorari be *dismissed*.

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Certiorari dismissed.*

* The provisions of the Revised Statutes, under which these proceedings were had, are the following: By the 103 § of chap. 16, (1 vol. 521,) it is made the duty of the commissioners of highways, where a highway is encroached upon by fences, to order, if they deem it necessary, such fences to be removed. This order must be in writing and signed, and notice in writing must be given to the occupant to remove the fences within 60 days. If the occupant denies the encroachment, the commissioners must apply to a justice of the peace of the county (§ 105) for a precept to a constable to summon 12 freeholders to meet at a certain day and place to inquire into the premises, and notice of such meeting must be given to the commissioners and to the occupant of the land. On the day specified, the jury are to be sworn by the justice, well and truly to inquire whether such encroachment has been made, and by whom. The witnesses produced by either party are also to be sworn by the justice, and the jury are to hear the proofs and allegations of the parties, (§ 106.) If the jury find an encroachment has been made, they are to make and subscribe a certificate in writing of the same, which must be filed in the office of the town clerk. The occupant must remove his fences within 60 days after the filing of the certificate, and pay the costs of the inquiry, which, if not paid within 10 days, the justice is to issue a warrant for the collection thereof, (§ 107.)

At the last August term of this court, an application was made in this case, on the part of the plaintiff, for a rule on the justice to make a *further or additional return* to the return already made by him, which was denied by the court substantially for the reasons now assigned on dismissing the *certiorari*, and that the justice could not be supposed able to make a fuller return.

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SOULDEN and others vs. VAN RENSSELAER.

v.
V. Rensselaer.

A plaintiff cannot avail himself of a *capias* issued to save the statute of limitations, altho' the same was regularly returned, entered on a continuance roll, and the continuances carried down to the time of the issuing of the process on which the defendant was arrested, unless he shews that the process on which the arrest was made is a continuation of the process originally issued, as that it is an *alias* or *pluries*, &c. The continuation of the suit must be proved, and will not be presumed.

Where a plea of *non assumpsit infra sex annos* was put in, instead of a plea of *actio non accrevit infra*, &c. and the plaintiffs replied a new promise, and gave evidence in support of the replication on the trial of the cause, the issue, tho' informal was held not to be immaterial and that the defect was cured by the verdict.

THIS was an action of assumpsit, tried at the Madison circuit in March, 1828, before the Hon. NATHAN WILLIAMS, one of the circuit judges.

The declaration was on a note dated 15th February, 1817, for 9600 weight of first quality potash, to be delivered half on the first day of July, and the residue on the first day of October next after the date of the note. The defendant pleaded *non assumpsit* and *non assumpsit infra sex annos*. The plaintiffs replied a new promise within six years before the commencement of the suit. On the trial of the cause, the plaintiffs proved an acknowledgment of indebtedness by the defendant on the 24th March, 1819, the issuing of a *capias* on the 22d March, 1825, tested the 5th March, and returnable on the 2d May thereafter: and produced a *continuance roll*, the caption of which was of the 2d May, 1825, and on which were entered the above *capias*, its return, and regular continuances down to the third Monday of February, 1826, of which term the declaration in this cause was capped, and rested. The counsel for the defendant objected to the proof offered by the plaintiffs, because the suing out of a previous *capias* and the continuation of the same had not been *replied*; and he objected that sufficient evidence had not been offered to take the case out of the statute, inasmuch as the plaintiff had failed to shew, by the production of the process on which the arrest was made, that such process was a continuation of the *capias* issued in March, 1825. The judge overruled the objections. The defendant then entered on his defence. In the progress of the trial, several other questions arose, which are not noted, as they are not passed upon in the opinion pronounced by this court. The plaintiffs had a verdict, to set aside which a motion was now made and argued,

J. A. Spencer, for defendant, insisted that evidence of the suing out of the first *capias* was inadmissible under the state of the pleadings; and that if received, the proof of the plain-

and that the defect was cured by the verdict.

tiffs was insufficient to entitle them to recover, as no connection was shewn between the first process and that on which the defendant was arrested. For aught that appeared, the last process, instead of being an *alias* or *pluries capias*, may have been simply like the first, a *capias*.

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H. C. Van Schaack, for plaintiffs. Proof of the issuing of the writ was admissible under the state of the pleadings. (1 Chitty's Pl. 552, 554. 1 H. Black. 631. 2 W. Black. 924. 2 Saund. 123, n. 5. 2 Chitty's Pl. 498, 654. 15 Johns. R. 326, n. b.) The continuances on the roll were perfect; they are mere matter of form, and may be entered at any time. (3 T. R. 664. 7 id. 618. 5 Cowen, 519. 12 Johns. R. 430. 18 id. 512. 1 Dunlap's Pr. 57, 124.) The statute was mispleaded, and the issue growing thereout was immaterial: it was therefore of no consequence whether there was a new promise or not. (1 Saund. 33, n. 2. 2 id. 63, c, d. Comyn's Dig. Assumpsit, H. 5. 2 Chitty's Pl. 498, n. 1 Selwyn's N. P. 150. 1 Esp. N. P. 294. 3 Burr. 1281.) And the defendant is not entitled to a re-pleader. (2 Saund. 319, a. b. Tidd's Pr. 830. 6 Johns. R. 5, n. e. Cowp, 510. 1 Str. 397. 2 Chitty's Pl. 694. 6 T. R. 131. 18 Johns. R. 20. 6 Cowen, 225.)

Spencer, in reply. The process on which the arrest was made must be continuance of the suit originally commenced. (2 Saund. 63, d. 2 Sellon, 62, 343, 4, 5. 3 T. R. 662, 664. 5 Barn. & Ald. 452.) The objection to the plea could be urged only on demurrer. Instead of doing so, the plaintiffs went to trial, choosing to consider it as good; and under the issue joined upon it gave evidence of a new promise. The plea of *not guilty* in *assumpsit* is bad on demurrer, but is cured by a verdict, (1 Saund. 319 a. n. 6.) The issue here, though it may have been *informal*, was not *immaterial*. (2 Tidd's Pr. 830.)

By the Court, MARCY, J. There is something anomalous in the pleadings in cases where the demand, after having been barred by the statute of limitations, or discharge under an insolvent law, is revived by an acknowledgment or a new

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promise. It is the new promise expressed or implied which entitles the plaintiff to recover, and the issue is generally upon that promise ; yet the declaration takes no notice of it. I believe there are no other instances in which the plaintiff can recover when the promise or undertaking on which the recovery rests is not introduced into his declaration. This anomaly was noticed in the case of *Depuy v. Swart*, (3 Wendell, 135.)

In this case, the declaration is on a promise to perform a future act ; no cause of action could therefore exist contemporaneously with the promise. The plea of *non assumpsit infra sex annos* was improper ; it should have been a plea of *actio non accrevit infra, &c.* A demurrer to it would have been sustained, but the plaintiffs preferred to take issue upon what they probably foresaw would be the main question in the cause. As neither the original promise nor the accruing of the action were within six years of the commencement of the suit, the plaintiffs must have expected to recover on a new promise or acknowledgment of the debt within that period. It was the issue formed by the pleadings, and the one in fact tried. It was intended to be the material issue in the cause, and yet we are asked to overlook it, to declare it to have been immaterial, and for that reason to give judgment in favor of the plaintiffs. Although it should be conceded that the plea on demurrer would have been adjudged bad, still that does not test the materiality or immateriality of the issue. The fact to be tried, the renewal of the demand by a new promise, was considered at issue by the parties, and I am therefore disposed to regard the pleadings as having terminated in an *informal* rather than an *immaterial* issue. There cannot, I think, be any reasonable doubt that the defect of the issue in this case is as effectually cured by the verdict as it would be in a case where *not guilty* should be pleaded to a declaration in *assumpsit*. A verdict in the latter case has been held to cure the defect of such an issue. (Cro. Eliz. 470. 1 Saund. 319 a, n. 6.)

The acknowledgment of the debt relied on by the plaintiffs was made on 24th March, 1819, and the capias on which the defendant, was arrested was issued more than six years subse-

quent to that time. To maintain the issue of a promise within six years of the time when the suit was commenced, the plaintiffs proved the issuing of a *capias* against the defendant on the 22d March, 1825, and its return. An exemplified copy of a continuance roll was then introduced, the caption of which was of the second day of May, 1825, on which the process in the suit was continued down to February, 1826, when the process on which the arrest was made issued. The defendant objected to the sufficiency of this proof, because it was not shewn that the process by which the defendant was arrested and brought into court was the *continuation* of that first issued. It was urged that if the process by which the defendant was brought into court was a simple *capias*, (and the plaintiff did not shew it was not,) it was the commencement of an original suit, and not the continuation of that commenced in March, 1825.

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There is no doubt but that the issuing of process before the statute of limitations attaches, and having it duly returned, may defeat the operation of that statute. This is said to save the statute, because, if at any time afterwards the plaintiff is under the necessity of prosecuting the suit, he may sue out an *alias* writ founded on the first writ or process, and proceed in his action. (2 Sellon's Pr. 343.) It is said by Lord Kenyon in the case of *Smith v. Bowen*, (T. R. 662,) "that if an action be commenced, though informally, to prevent the operation of the statute of limitations, it will have that effect if it be *duly continued*." So Ashurst, J. says in the same case, that "it is absolutely necessary not only that a writ should be sued out, but that it should be regularly continued." "When a writ is sued out to avoid the statute of limitations, it should be regularly entered on a roll and docketed with the sheriff's return and continuances down to the time of declaring. If there be two writs, the plaintiff cannot give them in evidence without shewing the first to be returned; for until that be done the court is not in possession of the cause so as to award an *alias* or *pluries* for bringing the defendant into court." (1 Tidd, 91. 2.) It appears to me that the plaintiffs should have shewn that the process issued corresponded with that awarded on the roll, and was actually a continu-

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ance of that first issued in the suit. Sellon says, as above quoted, that process sued out and returned saves the statute, because the suit can be continued by an alias writ founded on the first. A *capias*, which is neither an *alias* or *pluries*, issued subsequently to another writ, can in no sense be said to be founded on it. If the fact should be made out that they were for the same cause of action, the objection would not, I apprehend, be thereby removed. It is laid down that the same writ must be continued, so that it may appear that the plaintiff is proceeding to bring the defendant into court on the suit originally commenced. (2 Sellon's Pr. 344.) It appears from the case of *Smith v. Bowen*, already referred to, that where the first process was a *bill of Middlesex*, and the subsequent an *attachment of privilege*, the latter was held not to be a continuance of the former.

In the case of *Mois v. Bruerton*, (1 Ld. Raym. 553,) it was decided that a writ of *clausum fregit* sued out for the purpose of bringing the defendant into court to enable the plaintiff to declare against him in *assumpsit*, and continued down, will not prevent the statute of limitations from attaching on the *assumpsit*. The same point was also decided in the case of *Brown v. Babbington*, (2 Ld. Raym. 880.) In *Beardmore v. Battenbury*, (5 Barn. & Ald. 452,) the court of king's bench decided that irregularity in the first process does not deprive the plaintiff of the advantage he derives from having commenced proceedings before the statute attached; but in that case the process was properly continued, and the writ on which the defendant was brought into court was an *alias testatum capias*. I think all the cases shew that the process subsequent to the first must be founded upon it in order to effect a continuance of the suit.

In *Stanway v. Perry*, (2 Bos. & Pul. 157,) a *capias* was issued before the statute attached, but not served; and after the limitation had expired, a *capias per continuance* was issued, served and returned. It was held that the first writ not being returned, could not be connected with the second to save the statute. Where the second writ is an *alias*, yet the suit is not continued if the first is not returned. (14 East, 491.) The question in litigation between the parties in this

case was whether this suit had been commenced within six years after the new promise. The commencement of a *suit* was proved, but whether it was *this suit* or not depended, in my judgment, on the process on which the defendant was arrested and brought into court. That process is not shewn; it might have been an *alias* or a *pluries*, or a *testatum alias* or *pluries*, and it might have been a simple *capias*. In the case of *Kingsley v. Hayward*, (1 Ld. Raym. 432,) when before the common pleas, it was decided that the court would presume the first writ (being shewn to have been sued out) to have been returned, and also continued, unless the contrary appeared; but the K. B. reversed the decision, not precisely on that point, but because the continuances of the writ were not pleaded, and it was not averred that the suit was undetermined. Although the plaintiffs in the cause before us were not, by the course of the pleadings, called on to state in replication the fact of the commencement of a suit before the statute had attached, yet I think they must prove as much as they would have been required to state had the fact been pleaded. If there had been an issue as to the time of the commencement of the suit, the last process must have been shewn to be connected with the first, or the suit could not be adjudged to have originated with the first. The continuance after the first process is a fact to be proved and not intended. If the defendant was brought into court on a simple *capias*, the issuing of it was the institution of a new suit, and not the continuation of that commenced on the 22d March, 1825.

In overruling the objection to the proof of the continuance of the suit, I think the judge at the circuit erred. I am therefore for granting a new trial.

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It is irregular for a sheriff and jury, on executing writs of inquiry, to hear evidence in several causes before they retire to make up their inquiries. Such irregularity may be waived by the assent of parties; if not waived, the remedy is not by writ of error, but by motion to set aside the proceedings.

ERROR from the New-York common pleas. The error relied on is an *error in fact* specially assigned, to wit, that on the execution of the writ of inquiry in the suit in the court below, the sheriff and jury, after hearing the evidence in the cause between these parties, which was an action for an assault and battery, heard the evidence in *seven* other causes, two of which were for assaults and batteries, and one in slander, and heard the arguments of counsel in those several causes before they retired to consider of the inquisition to be made in this cause; and when they did retire, they deliberated at the same time upon the matters given them in charge in the several suits. The defendant in error pleaded *in nullo est erratum*.

B. Ferris, for plaintiff in error.

J. A. Sidell, for defendant.

By the Court, SUTHERLAND, J. The proceeding complained of was undoubtedly improper; but I am inclined to think it was an *irregularity* which should have been corrected by motion in the court below, and is not a subject of a writ of error. The error is no part of the record; it occurred in an interlocutory proceeding in the cause, which the court below, under certain circumstances, might, in the exercise of a sound discretion, have refused to set aside. It it should have appeared (as it might on motion) that the defendant below assented to the course of proceeding before the sheriff, he would have been precluded from availing himself of the irregularity. (*Colden v. Knickerbacker*, 2 Cowen, 51. 2 Dunlap's Pr. 1147 to 1154. 1 Archb. Pr. 211.) The judgment must be affirmed.

Judgment affirmed.

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GOODSELL vs. MYERS.

THIS was an action of assumpsit, tried at the Oneida circuit in April, 1827, before the Hon. NATHAN WILLIAMS, one of the circuit judges.

The plaintiff declared as the endorsee of two promissory notes made by the defendant for the sum of \$40 each, dated 4th April, 1825, payable to Jacob Adams or order. The defendant pleaded the general issue and infancy. To the plea of infancy, the plaintiff replied that after the making of the promises, and before the commencement of this suit, to wit, on the 7th January, 1826, at, &c. the defendant assented to, ratified and confirmed the said several promises, &c. and that at the time he so assented to, ratified and confirmed the said promises, he, the said defendant, was of the age of 21 years, and this, &c. wherefore, &c. The defendant rejoined that he did not, after he attained the age of 21 years, and before the commencement of the suit, assent to, ratify or confirm the said several promises, &c. *in modo et forma*, &c.

On the trial of the cause, the plaintiff proved the making of the notes and the endorsement of the same, and rested. The defendant's counsel insisted that the infancy of the defendant being admitted by the replication, the plaintiff was bound to prove the ratification of the promises, or that he must be nonsuited, and so ruled the judge. The plaintiff then proved an admission of the defendant, that he attained the age of 21 in May, 1825, and that in February, 1826, the defendant *spoke to a witness about the debt he owed to Dr. Adams, and said he was then going to settle with and pay him.* The witness who testified to this fact, stated further that the defendant resided with him at the time he became indebted to Dr. Adams, that he knew the bargain between them, that the defendant bought a horse of Dr. Adams and gave him the notes in question in payment; that during the summer and fall of 1825, he often heard the defendant speak of the debt

Infancy is admitted by a replication of a new promise to a plea of infancy, and need not be proved by the defendant.

The ratification of an infant's contract should be a promise to a party in interest or his agent or at least an explicit admission of an existing liability, from which a promise may be implied.

The ratification should be equivalent to a new contract. The note of an infant is voidable, not void, and may be affirmed after the infant comes of age. So held in a case where the action was on a negotiable note.*

* This case and the remainder of the cases published as of this term, were decided at the last August, term.

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as still due to Dr. Adams. This witness, on his cross-examination, stated that he was *not the agent* of Adams, and had no interest in the notes.

The defendant's counsel moved for a nonsuit, because there was not sufficient evidence of a new promise to charge the defendant, and that the promise, if any, was not made to the plaintiff. The judge refused to nonsuit the plaintiff, and charged the jury that if they were satisfied from the evidence in the case that the defendant, after he attained the age of 21, had assented to, ratified and confirmed the promises laid in the declaration, they would find a verdict for the plaintiff for the amount of the notes, otherwise for the defendant. The jury found for the plaintiff, and a motion was now made for a new trial.

C. P. Kirkland, for defendant. The notes in this case given by an infant, being *negotiable*, are *void*; and the reason is, that if the note be valid in the first instance as a negotiable note, the consideration cannot be inquired into when in the hands of a *bona fide* holder, and the infant would thereby be precluded from questioning the consideration. (10 Johns. R. 33. Chitty on Bills, 16, n. x. 1 Campb. N. P. 552, 3, n. 1 T. R. 40.) If the notes were only voidable, there was not sufficient evidence of a new promise after the defendant attained his age. A promise to render a note given by an infant operative must be express; a bare acknowledgment of the debt is not a sufficient confirmation. (Chitty on Bills, 17. 2 Esp. R. 481, 628.) Besides, the promise here was not to a party, but to a stranger. A promise even to a payee will not enure to the benefit of an endorsee. (Chitty on Bills, 23.)

W. H. Maynard, for plaintiff. The plaintiff was not bound to prove a ratification of the promises laid in the declaration. It was incumbent on the defendant to prove his non-age. So it is expressly decided, in a similar state of pleadings, in *Berthwick v. Carruthus*, (1 T. R. 648,) this case forming an exception to the general rule that what is confessed by the pleadings need not be proved. Although the plaintiff, in compliance with the direction of the judge, did prove

a ratification of the promise, after the defendant admitted he was of age, he furnished no proof that the defendant was an infant at the making of the notes ; and as no evidence of infancy was given by the defendant, the plaintiff is entitled to judgment.

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There is some diversity in the books as to the confirmation of a *negotiable* note given by an *infant* ; but surely it cannot be that a note, as well as a contract or promise, cannot be confirmed after the party contracting arrives of age. The general doctrine is, that all contracts made by infants otherwise than for necessities are *voidable*, not void. (3 Burr. 1804. 1 Johns. C. 127. 7 Cowen, 22. 7 id. 179.) In *Massachusetts* it has been decided that the note of an infant may be confirmed, (10 Mass. R. 140 ;) so also that any contract may be confirmed which is voidable only and not void (14 Mass. R. 457.)

Kirkland, in reply. The case cited from 1 T. R. 648, stands alone, and is opposed to the well settled rule of law, that what is alleged by one party in pleading, and not denied by the other, is admitted. Archbold, in his Treatise on Pleading, 262, 3, says the illustration of Mr. Justice Buller is an anomaly in the law. If the doctrine of that case be correct, a replication like that interposed here is bad for duplicity and incongruity. If, however, the defendant was bound to shew his infancy, he is entitled to a new trial for the misdirection of the judge as to the course of the trial. The cases cited from the *Massachusetts* reports not arising on negotiable notes, do not conflict with the decision in 10 Johnson ; there is a manifest distinction between notes negotiable or not negotiable. The case in 10 Johnson is supported by Chitty on Contracts, 23 and 2 Kent's Comm. 192.

By the Court, SAVAGE, Ch. J. The note of an infant is *voidable*, not *void*, (1 Saund. on Pl. & Ev. 303,) and may be ratified after he comes of age. In this case the defendant was an infant when the notes declared on were given, and the infancy is admitted by the pleadings. The evidence of a subsequent ratification was merely a loose conversation, not

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with the payee or holder, or agent of the payee or holder of the note, but with a stranger, and in my opinion was wholly insufficient to charge the defendant. A ratification of an infant's contract should be something more than a mere admission to a stranger that such a contract existed ; there should be a promise to a party in interest or his agent, or at least an explicit admission of an existing liability from which a promise may be implied. This case is not similar to that of a note barred by the statute, where there has been a valid instrument, but the statute presumes payment from lapse of time ; any admission of an existing debt in such case is sufficient to rebut the presumption. It is not so in the case of a contract by an infant, (not for necessities.) The note during the infancy of the defendant was not an available instrument, and never can be available but by force of a ratification after the infant arrives of age ; and such ratification, it seems to me, must be equivalent to a new contract.

THE NORTH RIVER INSURANCE COMPANY vs. I. M. D.
LAWRENCE.

An insurance company, authorized to take and hold securities *bona fide* pledged to them to secure the payment of debts contracted with them, cannot loan money on the hypothecation of stock and the taking of a note as collateral security for the payment of the loan, when by the act of their incorporation, they are prohibited from *discounting* notes.

THIS was an action of assumpsit, tried at New-York circuit in February, 1828, before the Hon. OGDEN EDWARDS, one of the circuit judges.

The declaration contained a count on a promissory note given by the defendant to the plaintiffs, bearing date the 14th December, 1825, for \$3899, payable on demand, with interest, a count on an *insimul computassent*, and the common money counts. The defendant pleaded the general issue. The plaintiffs made a loan to the defendant of the sum of \$3899, and received from him the note declared on and an hypothecation of stock, viz. 10 shares of the stock of the Franklin bank, and 80 shares of the stock of the Life and Fire Insurance Company. The secretary of the Company


Where a power to loan money in a particular mode is given to a corporation, all other modes are necessarily excluded and all securities other than those allowed to be taken by the act of incorporation are void.

proved that all loans made by them were made on stock hypothecated, and promissory notes taken from the borrowers as collateral security ; that the interest demanded was seven per cent. payable semi-annually, on the first days of March and September, when the company made their dividends ; and that interest was never required to be paid in advance.

The plaintiffs were incorporated by an act of the legislature on the 6th February, 1822, as a fire insurance company, and also to insure vessels navigating the North (or Hudson) River and the lakes. In the act of incorporation is contained a *proviso*, "that it shall not be lawful for the said corporation to deal, or use or employ any part of the stock, funds or monies thereof, in buying or selling any goods, wares or merchandize, in the way of traffic ; or in the purchasing or discounting of any bill, bond, note (or) obligation whatever ; or in any other banking operations, or the purchase or sale of any stock or funded debt created or to be created under any law of the United States, or of any particular state ; but it shall nevertheless be lawful for the said corporation to purchase and hold any such stock or funded debt for the purpose of investing therein any part of their capital stock, funds or monies ; and also to sell and transfer the same when it shall be necessary for the payment of any losses they may have sustained, and again to renew such investments when and as often as the exigencies or a due regard to the interests of the said corporation shall require ; and also to *make loans of the capital stock, funds or monies on bonds and mortgages*, and the same to call in and re-loan, as occasion may render expedient."

A verdict was taken for the plaintiffs for the sum claimed to be due on the loan made by them, subject to the opinion of this court.

C. Graham, for plaintiffs. The proviso in the act of incorporation prohibits the plaintiffs from *discounting* any note, &c. The note in this case was not *discounted*. Discount is the payment of interest in advance. (19 Johns. R. 1.) The note was payable on *demand* ; it could not therefore be dis-

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counted; there could be no interest in advance. Besides, it was positively shewn that interest was not taken in advance.

The loan was made on the *hypothecation* of stock, the note being taken only as collateral security, and as evidence of the amount loaned. By the *fourth* section of the act of incorporation, the company are authorized to take and hold *securities bona fide* pledged to them, to secure the payment of any debt which may be contracted with them.

W. Slosson, for defendant. The plaintiffs have no right to make loans either on notes or hypothecation of stock; they can make loans only on bonds and mortgages. A corporation has only such powers as are granted to it, or as are necessarily incident to the grant. (15 Johns. R. 358. 19 id. 1. 2 Cowen, 664. id. 678. 1 Wendell, 56.

The very section under which the right is claimed forbids the purchasing and discounting of notes. If the business of the company assumes the character of a loan, it must be secured by bond and mortgage; it is the only mode in which the company is authorized to make a loan. That mode being prescribed, all other modes are necessarily excluded. It must be so, or the direction in the statute becomes a nullity.

Although, in common parlance, the transaction here was not the discounting of a note, it is so within the meaning of the act. It has every feature of a banking transaction, except that the note is payable on demand. The name is different, but the substance the same.

D. B. Ogden, in reply. There can be no *debt* contracted with an insurance company but by loan. The company may take securities for debts contracted with them. The act therefore contemplates a loan, and they have the power to make loans by necessary inference. Forbidding insurance companies to loan money on their own stock, admits of their making loans on the stock of other companies. The company are authorized to purchase stock. A loan on the credit of stock is a *conditional purchase* of stock; and the taking of a note as collateral cannot affect the purchase. The right to loan on bond and mortgage is an additional power conferred, and not a restriction of powers before granted. It is not

a banking transaction; if it be, every man who lends money on a promissory note is a banker.

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By the Court, SAVAGE, Ch. J. The manner in which this corporation are to manage their monied operations is clearly pointed out. They may loan money upon bond and mortgage, but on no other security. They shall not be concerned in the discounting notes, nor any other banking operations. They may purchase stock for the purpose of investment, but for no other purpose. It has often been decided that a corporation can do no act but such as is expressly authorized or necessarily implied in their act of incorporation. The plaintiffs might loan money upon bond and mortgage, but not on a note. They seem to be aware of this, and endeavor to make themselves secure by loaning the money upon an hypothecation of stock, and take a note as collateral security; but that is equally unauthorized. They may purchase stocks for the purpose of investment, and sell where losses make it necessary; but in no other way can they deal in stocks. But even if it were lawful to loan money upon the hypothecation of stocks, that would not authorize the taking a note by way of security for the loan. It is an evasion of the statute, which intended the company should not at all interfere with the banks in lending money upon personal security. It is a sufficient answer to this action that the plaintiffs, in taking the note in question, have done an act which they had no authority to do. They have no capacity to become the payees or endorsees of a promissory note. They cannot, therefore sustain an action in that character.

The defendant is entitled to judgment.

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Where the nature of the proceedings or the form of action or pleadings gives the opposite party notice to be prepared to produce a writing or instrument, if necessary to falsify his adversary's evidence, no other notice to produce it, is requisite. Accordingly it was held that notice to produce an execution was not necessary in an action against a constable for not returning the process and paying over the money where, in the declaration, the execution and the judgment on which it issued were fully described. Notice on the trial to a party to produce a written instrument, where there was no evidence that it was in his possession, and where his residence was shewn to be 15 miles from the place of trial, it seems would have been adjudged insufficient had the notice been necessary.

ERROR from the Onondaga common pleas. Story sued Patten before a justice of the peace, who rendered judgment for the plaintiff. The defendant appealed to the Onondaga common pleas. In the declaration, the plaintiff set forth a judgment rendered in his favor against J. Smith and G. Howland by Kelly Case Esq. the issuing of an execution thereon, and the delivery of the same to the defendant, as a constable, to collect. He then averred the collection of the money, and the neglect of the defendant to pay over the same to the plaintiff or the justice. On the trial of the cause, the justice who rendered the judgment proved the same. The plaintiff then offered to prove by the same witness the issuing of the execution, its delivery to the defendant as a constable, the collection of the money by him, and his neglect to return the execution and to pay over the money. The defendant objected to the evidence unless the execution was produced, or it was shewn that notice had been given to the defendant to produce it. The court sustained the objection. The plaintiff then gave notice in court to the defendant to produce the execution, which notice the court held insufficient, the residence of the defendant from the court house being 15 miles, and it not appearing that the execution was in court; whereupon the plaintiff was nonsuited.

F. G. Jewett, for plaintiff in error. The plaintiff was entitled to prove the contents of the execution without shewing that he had given notice to the defendant to produce it. The reason for giving notice, and the necessity for giving it, cease where, from the very nature of the suit or prosecution, the party must know that he is charged with the possession of the instrument, the contents of which are offered to be proved. (1 Starkie's Ev. 361, citing 4 Taunt. 865. 1 Campb. 143. 6 East, 421. See also, 1 Phil. Ev. 392; 14 East, 274; 17 John. R. 293; 13 id. 90.) Besides, the facts offered to be proved rested in parol, and it was not necessary to produce the execution.

Kellogg & Sandford, for defendant in error. The best attainable evidence must be produced to prove every disputed fact. (1 Starkie's Ev. 389. Norris' Peake's Ev. 15.) The contents of a writing cannot be proved by copy, still less by oral evidence. (1 Starkie's Ev. 390.) Process cannot be proved by parol. (12 Johns. R. 456. 7 id. 19.) Where a written instrument is to be used as a medium of proof, by which a claim to a demand arising out of the instrument is to be supported, the instrument itself must be produced, or notice given to produce it. (3 Bos. & Pul. 146.) In the recent case of *Gorham v. Gale*, (7 Cowen, 739,) which was an action against a sheriff for money received on an execution, this court held that parol evidence of the contents of the execution could not be adduced, reasonable notice not having been given to the defendant to produce it. So, in the various actions against sheriffs, &c. for escapes, false returns, &c. in which the process is necessarily set forth in the declaration, due notice to the defendant to produce the process on the trial, if the writ is not returned, is strictly demanded before parol evidence of its contents is admitted. (3 Starkie's Ev. 1335, 1341. Norris' Peake's Ev. 601.)

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The notice to produce the execution was insufficient. Proof that the defendant had the execution in court would not have superseded the necessity of notice, the object of which is not merely to enable the party to bring the instrument into court, but also to provide such evidence as the nature of the case may require to support or impeach the instrument. (1 Starkie's Ev. 359, 362. 2 Starkie's Cases, 283. 7 Cowen, 739.) Here there was no evidence that the execution was in the defendant's hands, and his residence was at the distance of 15 miles from court.

By the Court, SUTHERLAND, J. The plaintiff was improperly nonsuited. The case appears to me to fall within the well established principle, that where the nature of the proceedings or the form of action or pleadings gives the opposite party notice to be prepared to produce a writing or instrument, if necessary to falsify the plaintiff's evidence, no other notice to produce it is requisite. The defendant must have known, from the declaration in this case, that the contents of

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the execution in his possession would come in question; that the plaintiff could not recover without proving it. He was therefore bound to have it in court, ready to be produced, or suffer parol evidence of its contents to be given. (*The People v. Holbrook*, 13 Johns. R. 90. 1 Campb. 143. 3 Bos. & Pul. 143. 14 East, 274. 17 Johns. R. 293. 4 Taunt. 865. 1 Phil. Ev. 392. 2 Merriv. 464.)

In *Gorham v. Gale*, (7 Cowen, 739, and 6 Cowen, 467, note a,) the declaration was in the general form for money had and received, and of course gave no notice to the sheriff of producing the *fi. fa.* If it was necessary for the plaintiff in this case to give notice to the defendant to produce the execution, the case of *Gorham v. Gale* shews that the notice given was not sufficient; but I think notice was not necessary.

Judgment reversed, and venire de novo awarded.

SCHOFIELD and TAYLOR vs. BAYARD and others.

In an action against the drawers of a bill of exchange, dishonored by the drawees, but accepted by third persons *supra protest* for the honor of the drawers, payment must be demanded of the drawees, and notice of non-payment given.

Where a bill was payable in London, but by mistake was

sent from Birmingham, where the holders resided, to Liverpool, to be presented for payment, and the mistake was discovered and attempted to be cured by sending the bill to London, where it did not arrive until two days after its maturity, but would have arrived in season but for the oversight or negligence of the clerks of the post office in Liverpool, it was held, that such mistake or negligence was not a sufficient excuse for not presenting the bill on the day it fell due.

It seems, that where there is an impossibility to present the bill on the day it falls due, owing to unavoidable accidents, and the holder is not in fault for the delay, a subsequent presentment will be good.

THIS was an action of assumpsit, tried at the New-York circuit in January, 1828, before the Hon. OGDEN EDWARDS, one of the circuit judges.

The defendants drew a bill of exchange in the name of Le Roy, Bayard & Co., (the name of their firm,) dated New-York, 15th August, 1825, upon Messrs. Crowder, Clough & Co. of Liverpool, for £1000 sterling, payable in London, at 60 days after sight, to Mr. E. Peterson or order, and by him endorsed to the plaintiffs, merchants of Birmingham. The bill was protested for non-acceptance on the 10th September, and notice given to the defendants on the 17th October, after which Baring, Brothers & Co. of London accepted it *supra protest* in these words: "Accepted under

protest and account for honor of the drawers, and will be paid for their account if needful, and regularly presented when due." The bill was subsequently sent to Liverpool to be presented to the drawees for payment. The correspondents of the plaintiffs at Liverpool, on the 10th November, enclosed the bill to the plaintiffs in a letter, with advice that the presentation should be made in London, and the letter was put in the post office on the same day, in season for the mail for Birmingham on that day, but by some oversight of the clerks in the post office it was not sent until the next day, and consequently did not reach the latter place until the 12th November, which was *Saturday*. The bill could not be forwarded to be presented in season on that day, and *Monday* after was too late. Had the letter been forwarded from Liverpool on the 10th by the mail which left there on the evening of that day, it would have reached Birmingham about eleven o'clock A. M. of the next day, and might have been forwarded from thence to London by mail on the afternoon of the same day at 4 P. M., and would have reached London in sufficient time for the general delivery of letters, between 9 and 10 o'clock on the following morning, which would have been in season. The bill reached London on the 14th November, and payment was demanded of Messrs. Baring, Brothers & Co. who gave the following answer in writing: "Baring, Brothers & Co. accepted this bill conditionally, viz. to pay it if needful and regularly presented when due. The bill is expressly made payable in London, where payment should have been sought on the 12th inst.; that has not been done, and therefore they consider their friends, Messrs. Le Roy, Bayard & Co. as well as themselves, are acquitted from all liability by such irregularity." The bill was protested for non-payment, and notice given to the defendants on the 10th January, 1826. Messrs. Crowder, Clough & Co. were bankrupts when the bill was drawn, the drawers had no funds in their hands, and the bill would not have been paid by them had it been presented to them for payment when due. A verdict was taken for the plaintiffs for the principal, damages, exchange and interest, subject to the opinion of this court on a case made.

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G. Griffin, for plaintiffs. The acceptance of the bill having been refused, and notice given to the drawers, the holders had a consummated cause of action against the drawers, without presenting the bill again for payment, notwithstanding the acceptance *supra protest*. Such acceptance is not like an original acceptance; it probably imposed the duty of waiting, but did not destroy the right of action already attached; it was simply a collateral security.

If the presentation of the bill to the drawees for payment was under the circumstances of the case necessary, the protest in London was equivalent to such presentation. *Laches* is not imputable to the plaintiffs; due diligence was used on their part, and but for the accident or oversight in the post office at Liverpool, the bill would have been duly presented for payment on the day it fell due. The general rule is that *due diligence* shall be used by the holder, but if by accident or circumstances over which he has no control, a bill is not presented until after the lapse of the day of payment, he loses not his remedy. (Molloy, b. 2, ch. 10, § 27. See also 7 Mass. R. 483.) Where a bill drawn on *Leghorn* was not presented in due time, owing to the political state of the country, which rendered it impossible to present it, it was held that the due presentment of a bill necessarily implied an exception in favor of those unvoidable accidents which must prevent the party from doing it within the regular time. (2 Smith's R. 223.)

D. B. Ogden, for defendants. Whatever right of action existed was waived by the acceptance *supra protest*. The holders were not obliged to take such acceptance, (Chitty on Bills, 242, citing 2 Campb. N. P. 447;) but having elected to receive it, they were bound to treat it as an accepted bill, and accepted too in the terms imposed by the acceptors. If a bill is not present when due, the acceptor is discharged. The mail accident is no excuse. Why was not the bill retained in London? why was it sent to Liverpool? It is the fault of the parties themselves that it was not duly presented. Had it been presented, the probability is it would have been paid, as the only answer given was, that it was not presented in time.

Griffin, in reply. What is the effect of having a subsisting demand, and taking a collateral security? The party has a cumulative remedy. There is no case and no principle to support the doctrine that an acceptance *supra protest* destroys the right of action existing on non-acceptance and notice. The plaintiffs were not bound to keep the bill in London. It is a new principle of commercial law, that a bill must be retained in the place of acceptance. Bills of exchange, and particularly after acceptance, are intended to be negotiable and transferrable.

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By the Court, SAVAGE. Ch. J. Where a bill is accepted *supra protest*, the holder must demand payment, and if refused, notice of such refusal must be given. Such acceptance is a conditional engagement; and to render such acceptor absolutely liable, the bill must be duly presented for payment to the drawee, and protested in case of refusal. (*Chitty on Bills*, 242. 16 East, 391.) The above authorities say the payment must be demanded of the drawees; but if the bill is payable at a particular place, payment must be demanded at that place. In this case the only real question is, whether the holder is excused by reason of the mistake in the post office at Liverpool, from not making demand in season. It is proved in this case that the drawees were bankrupt when the bill was drawn, and had no funds of the drawers at that time or since, and that at no time would they have accepted or paid the bill. It does not appear, however, that the bill would not have been paid by the acceptors had it been regularly demanded. In the case of *Patience v. Townley*, (2 Smith, 223,) a bill drawn on Leghorn, due the 10th September, 1800, was not demanded till the 31st December; Leghorn being then occupied by the enemy, or in some such critical situation it was impossible to present it in season. The plaintiff had a verdict, which the court refused to set aside, Lord Ellenborough saying, "Duly presented, is presented according to the custom of merchants, which necessarily implies an exception in favor of those unavoidable accidents which must prevent the party from doing it within the regular time;" and it was left to the jury to say whether, from the situation of the country, it was impossible for the plain-

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tiff to present it in due time. That cause presented a case of *impossibility*; but this case presents no impossibility, if due diligence had been used. The plaintiffs should not have sent the bill to Liverpool at all. It is true, that after the letter containing it had been left at Liverpool, on the 10th November, it could not have reached London in season; but it was the fault of the plaintiffs to have parted with the bill in the manner they did. Instead of sending it to Liverpool, they should have sent it to London, and then it would have been in season, and probably would have been paid.

I am of opinion that, by the law merchant, payment should have been demanded in London on the 12th of November; and that not having been done, and there being no impossibility to prevent it but what is attributable to the want of due diligence on the part of the holders, the defendants are legally discharged, and are entitled to judgment.

STOLP VS. VAN CORTLAND.

A declaration in a justice's court, where the plaintiff declares on a book account generally, and at the same time exhibits a written account of items, is good; and on appeal, evidence should be received that the account thus exhibited was returned by the justice and filed with his return, although it was not attached to the return.

ERROR from the Onondaga common pleas. Stolp sued Van Cortland before a justice and obtained a judgment. Van Cortland appealed to the Onondaga common pleas. The justice made a return of *the proceedings* and judgment in the cause, in which he stated the issue as follows: "*The plaintiff declared on a book account generally and failure on contract*; the defendant pleaded the general issue, failure on contract, monies had and received;" and that issue being thereupon joined, the defendant demanded that the cause should be tried by a jury, &c. On the trial in the common pleas, the plaintiff produced on account of 22 items, and offered to prove the same. The evidence was objected to by the defendant, on the ground that the declaration was insufficient for that purpose, and the court sustained the objection. The plaintiff then offered to prove that the paper containing the said items was produced to and left with the justice at the time of the plaintiff's declaring in the cause, and at the joining of the issue between the parties, and *that the justice re-*

turned the same with his return, although it was not attached thereto, to the common pleas, and that it was filed therewith ; which evidence was also objected to, and refused to be received by the court. After the offer of further testimony, which was also rejected, the plaintiff was nonsuited.

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F. G. Jewett, for plaintiff in error.

B. Davis Noxon, for defendant.

By the Court, SUTHERLAND, J. The account which the plaintiff below exhibited to and left with the justice at the time of declaring and joining issue, must be considered a part of the declaration. The case of *Ehel v. Smith*, (3 Caines, 187,) is a direct authority to this point. It is not denied if it had been attached to or incorporated in the declaration, that it would have been sufficiently precise. But it is said that the justice in his return states that the "*plaintiff declared on book account generally and failure in contract ;*" and that it is contradicting the return to shew that at the same time he delivered an account to the justice, which, in judgment of law, became a part of the declaration. The justice states in his return that he makes return of the *proceedings* and judgment before him ; and among the papers returned and filed by him in this account, though it was not fastened to the return itself. The plaintiff offered to prove these facts, and to substantiate the account by proof ; this evidence was rejected by the court. The plaintiff was prohibited from proving that the account was delivered to the justice at the time of declaring, and was returned and filed by him in the court of common pleas ; and having rejected that evidence, proof of the items of the account was rejected because the declaration was too vague to admit it, and the plaintiff was nonsuited. The account was a part of the proceedings returned by the justice, and the plaintiff was entitled to the benefit of the fact of its having been returned by him : the legal conclusion from that fact is, that it was a part of the plaintiff's declaration. This, in no respect, contradicts the return. Suppose the justice should return that the plaintiff in an action before him declared in *assumpsit*, with-

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out stating any thing more, and should attach to the return a formal declaration in *assumpsit* between the same parties can there be a doubt that this would properly be considered a declaration? Whether it was actually attached to the return, or the papers were all put into a bundle and filed, cannot be material; they are the proceedings before the justice returned by him. The case of *Bowditch v. Salisbury*, (9 Johns. R. 366,) would seem to shew that the general form of declaring for a *book account*, without any specification, was good. (See, also, 3 John. R. 436.) On the other ground, however, I think the judgment should be reversed, and a *venire de novo* awarded to Onondaga common pleas.

McKEON vs. CAHERTY.

Debt and not
assumpsit is the
proper form of
action for the
recovery of
money from a
stake holder of
a bet on a trot-
ting match.

The action
may be main-
tained, altho'
the plaintiff
in fact acted
as the agent of
others in mak-
ing the bet.

ERROR from the New-York common pleas. The action in the common pleas was *assumpsit*, brought by McKeon against Caherty to recover \$200 deposited in the hands of the latter as the *stake holder* of a bet on a trotting match of horses, made up by McKeon and one Lane. The trotting took place; McKeon was the loser; and being dissatisfied with the manner in which the trial of speed had been conducted, he gave notice to Caherty, the stake holder, not to pay over the money to the winner, before he did pay it over. On the trial of the cause, it appeared that other persons besides McKeon had contributed in making up the purse; for this cause, and because the action, if any, should have been *debt* and not *assumpsit*, the defendant moved that the plaintiff be nonsuited. The motion prevailed on the first ground taken by the defendant.

D. Graham, for plaintiff in error. The action was properly brought. Had the plaintiff acted wholly as the agent of others, he might have sustained a suit in his own name. (13 Johns. R. 88.)

The contract upon which the money was put into the hands of the defendant being avoided by statute, he holds it

without consideration, and is liable to the parties for monies had and received. A right of action is given by statute against both *winner* and *stake holder*: the form of action against the winner is prescribed, viz. *debt*, but no form of action is given against the stake holder; consequently he is left to his common law remedy, adapting his action to his case. (1 R. L. 223, § 5. id. 153, § 2 and 3. 2 T. R. 531. 1 Bos. & Pul. 3 and 396. 1 Dallas' R. 245.) This form of action has been sustained. (10 Johns. R. 468. 7 Cowen, 496. Sec, also, 6 Cowen, 297.)

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J. R. Whiting, for defendant.

By the Court, SAVAGE, Ch. J. In *Yates v. Foot*, (12 Johns. R. 1,) it was decided that when money is deposited by an agent in the hands of a *stake holder* upon a bet, the action was properly brought by the principal against the stake holder; and it was also decided in that case that no action lies to recover from the stake holder money deposited upon an illegal wager. This was a decision of the common law question and has no relation to the cases of *gaming* and *horse racing* arising under the statutes on those subjects. The *fifth* section of the act to prevent horse racing makes every contract relating to any bet or any race or gaming of any kind void, and gives to any person who has paid any money upon the issue or event of any race or game the same remedy to recover it back as is provided by the *second* and *third* sections of the act to prevent excessive gaming. The second section of that act gives a remedy to the injured party by action of *debt* against the winner, if brought within three months.

In *Simmons v. Borland*, (10 Johns. R. 468,) and *Allen v. Ehle*, (7 Cowen, 496,) it was held that under the act to prevent horse racing, the action lies against the stake holder; but the statute remedy should be pursued, which is an action of *debt*. This objection is supposed to be technical; but without the aid of the statute, no action at all would lie. The statute remedy must therefore be pursued in form as well as substance. In *Haywood v. Sheldon*, (13 Johns. R. 88,) it was held that an action was well brought by an agent who makes a bet for others. On the supposition, therefore, that the ac-

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tion was well brought by the plaintiff, and that the stake holder is liable, still, as the plaintiff cannot recover in this form of action, the judgment must be affirmed.

SAYRE and TOLER vs. AUSTIN and FAIRMAN.

Interest may in all cases be collected by action of debt on judgment; and where the judgment is rendered on contract, it may be collected by directing its levy upon execution.

THIS was an action of debt, tried at the New-York circuit in March, 1826, before the Hon. WILLIAM A. DUER, then one of the circuit judges.

The declaration contained three counts: 1. On a judgment in assumpsit, in favor of the plaintiffs against the defendants, for \$481,41, obtained in the term of August, 1804; 2. On another judgment in assumpsit, of the same term, for \$461, 27; 3. A count for *interest* upon and for the forbearance of divers large sums of money before then lent and advanced, and due and owing by the defendants to the plaintiffs, and forborne by the plaintiffs at the special instance and request of the defendants, whereby an action accrued, &c. The suit was commenced in August, 1824, within 20 years after the rendition of the judgments declared on. The defendants pleaded to the two first counts payment and satisfaction, and to the third count *nil debet* and the statute of limitations. To the pleas of payment and the statute the plaintiffs replied.

On the trial of the cause a verdict was entered for the plaintiffs by consent for \$942,67 *debt*, and \$1434,91 (being the amount of interest upon the judgments) *damages*, by way of interest, subject to the opinion of this court on a case to be made.

W. A. Seeley, for plaintiffs. A plaintiff is entitled to his action of debt on judgment, in which the interest on the judgment may be recovered *by way of damages*. (6 Johns. R. 43, 284. 2 Vesey, jun. 162, 167, 168, n. 5 Binney, 58. 4 Dallas, 252. 1 Chitty's Pl. 354. 2 id. 181.) The action is on judgments in nature of specialties, and the statute of limitations does not apply except as to the third count, which may be regarded as surplusage.

R. L. Wilson, for defendants. At the time of the rendition of the judgments declared on, *interest* could not be levied upon executions. The right to do so was given by statute passed subsequent to the rendition of those judgments, viz. in 1806. The plaintiffs ought not to be permitted to recover more than they would have been entitled to recover had they revived those judgments by *scire facias*.

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The demand of the plaintiffs should be considered as a demand upon a specialty in which interest is not reserved. In such case interest is not recoverable until after *demand made*. (2 Gallison, 45, 6.) Interest is not allowed on taxation of costs where no delay has been occasioned by the defendant. (2 Caines, 253.) No demand being shewn, the plaintiffs are entitled to recover only from the commencement of the suit. (15 East, 223. 1 Campb. 49, 52.)

The demand for interest in this case is in the nature of a simple contract debt, and not of a specialty. The interest is demanded in the third count in consequence of the forbearance of the plaintiffs. This count could be supported only by proof of a request to forbear, or an implied request. No proof was offered, and the implied request is destroyed by the plea of the statute of limitations. Bull. N. P. 149 6 T. R. 193. 6 Vesey, 215. 20 Johns. R. 582.)

By the Court, SUTHERLAND, J. The act of 1813, (1 R. L. 506,) merely provides, that in all executions to be issued on judgments *thereafter* to be recovered upon contracts, it shall be lawful to direct the collection of the interest on the said judgments from the time of recovering the same until paid. It is not by virtue of this act that judgments carry interest; it only authorizes the collection of it upon execution.

It cannot be contended, with any shew of reason or authority, that a judgment is a debt not due until a demand of payment is made, after the original cause of action has not only been demanded, but has been prosecuted to judgment, the highest evidence of debt known to the law, and which authorizes the plaintiff immediately to issue an execution

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and seize either the property or the person of the defendant. It certainly savours somewhat of extravagance to maintain that the judgment is not a debt due in every possible sense of the term. It is a debt due, with interest from the time of its rendition, which, since the statute, may be collected upon the execution, and before the statute, could have been recovered by action of debt upon the judgment.

It might have been recovered under the two first counts; and there being no evidence applicable to the third count, we have a right to consider the verdict throughout as given upon those counts. It is then unquestionably a demand in the nature of a specialty, and the statute of limitations does not apply.

Judgment for plaintiffs.

OTIS vs. WOOD.

Where it is a condition in a lease of personal property that the lessee shall keep it upon particular premises and not remove it therefrom, a removal of such property by the lessee operates as a forfeiture of the term, and divests his title so that no interest in the property removed remains in him that can be sold by execution.

If property thus circumstanced is levied on and sold under an execution against the lessee, the lessor is entitled to maintain an action of trover against the officer.

THIS was an action of trover, tried at the Oneida circuit in April, 1828, before the Hon. NATHAN WILLIAMS, one of the circuit judges.

In April, 1826, Otis executed a lease to one Goodenoe of 15 acres of land in the town of Manlius, Onondaga county, and included in the lease a span of mares, a cow and eight sheep, and other personal property to which specific prices were attached, for the term of *ten years*; Goodenoe to pay a rent at the rate of \$30 per annum, and to have the right, on payment of the sum of \$400, to become the owner of the whole premises demised. By the terms of the agreement, Goodenoe was precluded from selling or disposing of his term, and from selling or disposing of the articles of personal property specified in the lease, and was bound to keep the same *on the premises*; and in case of the death, by accident or otherwise, of the mares, cow or sheep, to replace them by others of the like kind and value. On failure of the conditions of the lease, Otis reserved the right of re-entry on the premises, and to seize and take the personal property and dispossess Goodenoe. In September, 1826, Goodenoe, by a written instrument, mortgaged to Otis a set of harness and

other property to secure the rent which had been accrued, and money which had been lent by him to Goodenoe, the mortgage to be void on payment of \$70 by the 1st January, 1827. In October or November, 1826, Otis removed from Manlius to Herkimer county, and in December, 1826, Goodenoe also removed from Manlius and went to reside at Vienna in Oneida county, taking with him the mares let to him by the plaintiff, and also the harness mortgaged to the plaintiff; and within two weeks after his removal the property was levied on by the defendant, a constable of Vienna, by virtue of a justice's execution against Goodenoe, and sold about the 1st April, 1827. After the levy and previous to the sale, the plaintiff and Goodenoe requested a person with whom the mares were left as receptor, to work them, enough to pay for their keeping.

On this state of facts the defendant contended that the agreement between Otis and Goodenoe was a contract of sale and vested the property in Goodenoe; that the agreement was fraudulent as against creditors; and that the plaintiff's right of action, if any, did not accrue until the expiration of the ten years. The judge ruled that the instrument of 15th April, 1826, was not a contract of sale, but a lease, and that a purchaser of the property under process of law would acquire the rights of the lessee; that a sale of the property by operation of law would not create a forfeiture, but that the removal of the mares from the premises demised would have had such effect, had not the evidence warranted the conclusion which he thought it did, that the plaintiff had waived the forfeiture, and that therefore the plaintiff was not entitled to recover for the mares, but he charged the jury that the plaintiff was entitled to recover for the harness. The jury found for the plaintiff with \$15 damages, the probable value of the harness. A motion was made on the part of the plaintiff to set aside the verdict.

A. Bennett & J. A. Spencer, for plaintiff.

G. C. Bronson, (attorney general,) for defendant.

By the Court, SAVAGE, Ch. J. I think the judge was right in deciding that the contract of April, 1826, was not a sale but a lease; that the interest of a lessee of personal proper-

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ty may be sold on execution, and that in such case the purchaser stands in the place of the lessee. (*Van Antwerp v. Newman*, 2 Cowen' 543.) In the case of *Hurd v. West*, (7 Cowen, 656, it was held, that where sheep were let for a specified time, and the same sheep to be returned, the title of the lessor continues with the right to assert it when the time expires. In *Marsh v. Lawrence*, (4 Cowen, 467,) it was decided that a mortgagor in possession of a chattel, after forfeiture, or when the mortgagee might take possession at his pleasure, had no interest which was the subject of sale on execution; and in *McCracken v. Luce*, not reported, decided at August term last, it was held, that a mortgagor of a canal boat, in possession and having the right of possession for a time certain, had an interest which was the subject of sale on execution. The principle of these cases is, that a person in possession of a chattel, having a right to such possession for a specific time, has an interest which may be sold; and when that interest expires the owner is entitled to his goods and may bring an action for them.

In this case the lessee had forfeited his interest in the mares in question, according to the terms of his contract, by removing them from the demised premises. The plaintiff, therefore, had the same right to the possession of the animals which he would have had, if Goodenoe had remained on the premises till the expiration of his lease.

It is said, however, that the plaintiff had waived his right to re-enter upon the possession of his property by acquiescence. I do not perceive any evidence of acquiescence; there is no proof of the plaintiff's knowledge of Goodenoe's removal with the property from the demised premises previous to the levy by the defendant. But if there was such evidence, according to the case of *Marsh v. Lawrence*, the plaintiff waived no right by leaving the property in the hands of the lessee. So long as he had a right to the possession which he might enforce at pleasure, (2 Wendell, 475,) the lessee had no interest in the mares which was the subject of sale.

A new trial should be granted.

END OF JANUARY TERM.

CASES
ARGUED AND DETERMINED
IN THE
THE COURT FOR THE TRIAL OF IMPEACHMENTS
AND THE
CORRECTION OF ERRORS
OF THE
STATE OF NEW-YORK.

**Argued in the session of the Court holden in September and October,
1829, and determined in December of the same year.**

MEMBERS OF THE COURT,

REUBEN H. WALWORTH, *Chancellor.*

JOHN SAVAGE, *Chief Justice,* } *Justices of the*
 JACOB SUTHERLAND, } *Supreme Court.*
 WILLIAM L. MARCY, }

SENATORS.

FIRST DISTRICT.*

JOSHUA SMITH,
JOHN I. SCHENCK,

STEPHEN ALLEN.

SECOND DISTRICT.

PETER R. LIVINGSTON,
BENJAMIN WOODWARD,

WALKER TODD,
SAMUEL REXFORD.

THIRD DISTRICT.*

JOHN M'CARTY,
MOSES WARREN,

LEWIS EATON.

FOURTH DISTRICT.

JOHN L. VIELE,
DUNCAN M'MARTIN, JUN.

REUBEN SANDFORD,
JOHN M'LEAN, JUN.

FIFTH DISTRICT.

CHARLES STEBBINS,†
TRUMAN ENOS,

NATHANIEL S. BENTON,
WILLIAM H. MAYNARD.

SIXTH DISTRICT.

PETER HAGER,
THOMAS G. WATERMAN,

GRATTAN H. WHEELER,
JOHN F. HUBBARD.

SEVENTH DISTRICT.

TRUMAN HART,
WILLIAM M. OLIVER,

GEORGE B. THROOP,
HIRAM F. MATHER.

EIGHTH DISTRICT.

ETHAN B. ALLEN,
GEORGE H. BOUGHTON,

TIMOTHY H. PORTER,
MOSES HAYDEN.

*ROBERT BOGARDUS, a senator from the first district, and AMBROSE L. JORDAN, a senator from the third district, resigned their seats as members of the senate previous to the session of this court in September, 1829.

†The lieutenant governor, ENOS T. THROOP, who is *ex officio* president of the senate and a constituent member of this court, having assumed the duties of the office of governor of the state, in consequence of the resignation of the governor, MARTIN VAN BUREN, on his appointment as secretary of state of the United States, CHARLES STEBBINS, a senator from the fifth district, was chosen president of the senate *pro tem.* and presided at the sessions of this court in September, October and December, 1829.

CASES IN ERROR.

HALSEY ROGERS, impleaded with others, *appellants*, and **SIDNEY ROGERS** and others *respondents*.

A devise to A. B. for and during his natural life, and after his decease to the children of his body lawfully begotten, followed by an *habendum clause* to have and to hold unto the said A. B. for and during his natural life, and after his decease to the heirs of his body lawfully begotten and their heirs and assigns forever, gives a *life estate* to A. B. and a *remainder in fee* to his children.

It is not competent to a court of chancery to set aside a will or codicil as to real estate on the ground of fraud or incompetency of the testator; the question should be determined in a court of law on an issue from chancery of *devisavit vel non*. It is otherwise as to a will of personal estate.

An executor, by virtue of his office, becomes a *trustee* for the devisees and creditors of the testator, when it is ascertained that the personal property of the estate is insufficient to pay the debts of the testator; and in such case it will not be permitted that he sell the real estate of the testator under a judgment held by him, and himself become the purchaser.

A debt, barred by the statute of limitations in the life time of the testator, is presumed to be paid by him, and is therefore not a legal demand or a just debt. An executor has no right to retain for such a demand due to him personally, notwithstanding a provision in the will for the payment of all just debts, and that even in a case of parent and child.

Personal property specifically bequeathed to the widow of the testator must be applied to the payment of the debts of the estate before land devised by the will can be made chargeable. Nothing but an express declaration or plain manifestation of intention will exonerate the application of the personal estate, and cast the charge upon the realty.

APPEAL from chancery. The respondents filed their bill in chancery to vacate a sale of lands procured by the appellant, Halsey Rogers, under a judgment of which he was the assignee, obtained originally against Thomas Rogers, senior, (the father of Halsey Rogers and the grandfather of the respondents,) under whom the respondents claimed as devisees.

In 1803, *Thomas Rogers, senior*, made his last will and testament, by which he ordered, first, all his just debts and funeral charges to be paid; second, he devised to his wife, Abigail Rogers, during her natural life, 75 acres of land, and gave and bequeathed to her all his household furniture, besides sundry items of personal property; third, he made a

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devise of a lot of land of 100 acres in these words: "I give, devise and bequeath unto my son, *Thomas Rogers, junior*, for and during his natural life, and to the *children* of his body lawfully begotten, after his decease, all that certain piece or parcel of land, &c. (particularly describing it,) to have and to hold the said last mentioned premises unto my said son, *Thomas Rogers, junior*, for and during his natural life, and after his decease, to the heirs of his body lawfully begotten, and their heirs and assigns forever;" and after several other specific devises of real estate to his other children, and several bequests of personal property, he gave the *residuum* to three sons and four daughters, to be equally divided between them share and share alike. *Thomas Rogers, junior*, died intestate in 1805, leaving three children, two of whom are the respondents in this cause. On 17th August, 1816, *Thomas Rogers, senior*, made a codicil to his will, by which he made several alterations as to the disposition of his property, not, however, affecting the property devised to his son, *Thomas Rogers, junior*, otherwise than by giving authority to Halsey Rogers, whom he thereby created *sole* executor of his will, to sell and dispose of so much of his real estate as would be necessary for the payment of his debts. By this codicil he revoked the appointment of A. Doty and T. Littlefield, whom he had appointed jointly with Halsey Rogers, executors of his will made in 1803. Three days after making the codicil, the testator, *Thomas Rogers, senior*, died.

Halsey Rogers, as *sole* executor of the testator, proved the will and codicil, and made an inventory of the personal estate, amounting to the sum of \$1454,12; part of which he sold at public auction, and applied the proceeds, viz. \$509, to the payment of the debts of the testator; another portion, amounting to \$703,16, he permitted his mother, the widow of the testator, to retain in her possession, and the residue remains unaccounted for. In 1820, Halsey Rogers procured to be *revived* a judgment against *Thomas Rogers, senior*, docketed the 26th January, 1814, rendered on a bond bearing the date the 20th December, 1809, conditioned for the payment of the sum of \$3000, with annual interest, executed by *Thomas Rogers, senior*, to James Rogers, and assign-

ed in 1813, by the executors of the obligee, to Halsey Rogers, who purchased the same and procured an assignment thereof to himself, at the request of his father Thomas Rogers, senior. After the revival of the judgment, he caused an execution to be issued thereon, and sold *all the real estate* whereof his father died seised, except the lot devised to his mother, and became himself the purchaser thereof for \$2270. The true value of the lands thus sold was not less than \$9000.

In 1822, the respondents filed their bill, the appellant put in his answer and proofs were taken, much of which went to the *competency* of the testator to devise at the making of the codicil; the balance of testimony is against his competency, and although no direct adjudication was made upon the point in the court of chancery, the codicil was treated as void. In August, 1825, after hearing upon bill, answer and proofs, Chancellor SANDFORD, (1 Hopkins' Ch. R. 515,) declared the sale of the real estate of Thomas Rogers, senior, to be illegal and void, and ordered an account to be taken between the estate of Thomas Rogers, senior, and Halsey Rogers, charging the latter with all the personal estate and crediting him with all legal and just demands, &c. and also ordering an account between the complainants and Halsey Rogers as to the rents and profits of the lot devised to Thomas Rogers, junior, and as to timber alleged to have been cut and carried away from the same. Accounts were accordingly stated by a master. In stating the account of debts due from the testator at the time of his decease, and of payments made by the executor, including claims of the executor himself against the testator, the master reported a balance to be due to the executor of \$4263.22, but he rejected three promissory notes, drawn by the testator, payable to the executor, dated, two in 1805 and one in 1809, amounting together to the sum of \$311.44, on the ground that they were barred by the statute of limitations; and he certified the amount of the rents and profits received and the value of the timber cut and carried away by Halsey Rogers from the lot devised to Thomas Rogers, junior, to be \$528.25. To

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the master's report in those particulars, to wit, the rejecting the notes and certifying the last mentioned amount as well as in other respects, exceptions were taken by the appellant, which were argued before Chancellor JONES. The exceptions to the particulars above stated were *disallowed* whilst others were allowed on 18th April, 1828, and the report was referred back to the master for correction. The report being corrected, the cause was heard by Chancellor WALWORTH in August, 1828, who made a final decree in the same, (1 Paige's Ch. R. 188,) by which it is declared that the personal property bequeathed to Abigail Rogers, the widow of the testator, amounting to \$703,16, ought to be applied together with the interest thereof from the end of the year after the death of the testator, to the payment of the judgment which the appellant, Halsey Rogers, holds against the estate of the testator, and a decree is made accordingly; and it is further decreed, that if after deducting that sum and the proceeds of certain lands which *descended* to the heirs of Thomas Rogers, senior, a balance shall still be still left due to Halsey Rogers on the judgment held by him, that an apportionment be made of such balance among the lands specifically devised by the testator, charging the lands devised to Thomas Rogers, junior, with their share, and crediting such lands with the amount reported to be due for rents, &c. and ordering the appellant, Halsey Rogers, to pay the costs of the suit to be taxed. From this decree and the decrees previously made in the cause the defendant below appealed.

J. Lansing & G. C. Bronson, (attorney general,) for the appellants.

L. Wait & S. A. Foot, for the respondents.

The points raised for the *appellants* and argued by the counsel were the following: 1. That the sale under the judgment held by Halsey Rogers as assignee of the real estate and the purchase of the same by him was not illegal, nor a violation of his duty as executor of the last will and testament of Thomas Rogers, senior.

2. That the decree of Chancellor JONES, disallowing the exceptions to the master's report, is erroneous; *first*, because

the statute of limitations ought not to have been allowed as a bar to the claim for the *notes* set up by the executor as due to him; and *secondly*, that the appellant, Halsey Rogers, ought not to have been charged with the rents and profits, &c. of the lot devised to Thomas Rogers, junior, because the devise to him lapsed and became void by his death during the life time of the testator, Thomas Rogers, senior.

3. That the decree of Chancellor WALWORTH is erroneous; *first*, in charging the appellant Halsey Rogers with the amount of personal property specifically bequeathed to the widow; and *secondly*, in decreeing costs against the appellant Halsey Rogers.

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The following opinions were delivered:

By Chief Justice SAVAGE. The questions in this case in the natural order in which they arise, are the following;

1. Have the complainants an interest in the estate of Thomas Rogers, senior, deceased, by virtue of the special devise to their father, Thomas Rogers, junior, or as residuary legatees?

2. Is the codicil to be considered part of the will of Thomas Rogers, senior, deceased?

3. Was the sale by virtue of the judgment and execution irregular?

4. Were the promissory notes referred to in the exception to the master's report properly rejected as being barred by the statute of limitations?

5. Should the appellant be held responsible for the personal property delivered to the widow?

6. Was it equitable and just to charge the appellant with the costs of the suit?

1. The clause in the will out of which the first question arises is as follows: "I give, devise and bequeath unto my son Thomas Rogers, junior, for and during his natural life and to the children of his body, lawfully begotten, after his decease, all that certain, &c." (describing the premises) "to have and to hold the said last mentioned premises unto my said son Thomas Rogers, junior, for and during his natural life, and after his decease,

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to the heirs of his body, lawfully begotten, and to their heirs and assigns forever." What estate is conveyed by this devise? and to whom? Were the answer to these questions to be given by plain unsophisticated common sense, it would be this: that an estate for life is given to Thomas Rogers, junior, and after his death an estate in fee to his lawful children. Such is the apparent intention of the testator; but it is not enough to ascertain the intention of the testator as we suppose it to have existed; we must further enquire, whether that intention is agreeable to the rules of law which have been long and well established, and what is the legal import of the terms used by the testator.

It may not be improper to remark here, that by the common law there are but two modes of acquiring title to real estate, viz. descent and purchase. Where a person takes as heir at law, he is in by descent; the law casts the estate upon him at the death of his ancestor; but when he acquires title to land by his own act or agreement, he is a purchaser; not that in the common acceptance of the term he has paid a consideration for it, for if it is given to him he is still, in contemplation of law, a purchaser. A devisee, who takes an estate different from what the law would cast upon him as heir, is a purchaser, and as such was exempt from the restraints imposed upon heirs in their minority, such as wardships and the right of marriage. These are remnants of the feudal system which have their influence upon the conveyances of the present day, and even in this country, though happily with the system itself we have no connection. It was perfectly natural that during the prevalence of military tenures restraints should be imposed upon devises of real estate; and it was established as a rule of law, at least as early as the 23d Eliz. about 1581, that "Where the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, that always in such cases the words *the heirs* are words of limitation of the estate, and not words of purchase." This rule was established in *Shelley's case*, (1 Coke, 94,) and has been uniformly adhered to in England, and numerous cases are to be found in the books

as applicable to devises. (Cruise, tit. 38, Devise, ch. 14.) In the case of *Perrin v. Blake* in the above chapter, § 69, the devise was substantially, "I give, devise and bequeath all the rest and residue of my estate to my son J. W. for the term of his natural life; the remainder to J. G. and his heirs for and during the natural life of my said son J. W.; the remainder to the heirs of the body of my said son J. W. lawfully begotten or to be begotten," &c. The testator had prepared this devise with a declaration that it was his intention and meaning that his heirs should not sell his estate for a longer period than their own lives. The court of king's bench decided that J. W. took a life estate only, and not an estate tail.

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As this case of *Perrin v. Blake* is not found in books of reports which are common, a more detailed account of it may be acceptable. It was twice argued, and was one of the only two cases in which there had been a serious difference of opinion in the court for a period of fourteen years. The judges delivered their opinions *seriatim*, and occupied five hours. Mr. Justice Willes said there were two questions: 1. What appeared to be the intention of the testator? 2. Was that intention agreeable to the rules of law? The intention was apparent from the introductory clause which governed the whole will. If he could give an estate for life to one and the inheritance to the heirs of the body of the first devisee, and if his intention appeared to be so, he should think that intention must control the legal sense of the words *heirs of the body*. The rule contended for, which was in *Shelly's* case, [was pronounced by Lord Coke upon a deed and in argument; and though he should be for adhering to it in every case literally within it, yet it must not be extended an inch. The maxim itself grew with feudal policy, and the reasons of it were antiquated. The logicians say, *cessante causa cessat effectus*, and surely the lawer may say I will confine an old rule within its exact bounds, and extend it as little as possible. Mr. Justice Aston said, that the fundamental rule was that the intention of the testator was to be collected and allowed, though not expressed in any legal language. The intention was clear to give an estate for life; and where the intention is clear, it should govern. He ad-

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mitted the rule in *Shelley's case*, but it was not to be extended. The word *heirs*, he said, was a term of art; it was necessary in a deed, but not in a will. Mr. Justice Yates said, he allowed that in a will free scope was to be given to the intention; but the intention must be manifestly clear and consistent with the rules of law. After you have fixed the intention, it then becomes a question whether such intention can be executed consistently with the established rules of law; if it cannot, we had better adhere to the law, and let a thousand testators' wills be overthrown. It had been argued that the intention of the testator must be carried into execution in whatever words he should have explained such intention, but he could not accede to so unbounded a proposition; that in case of a trust it was so, but in case of a legal devise it will overthrow the established law. He adhered to the rule in *Shelley's case*; and as to intention, a will shall be so construed as to fulfil the intention so far as is consistent with rules of law. In established rules of construction consisted the safety and certainty of property; and this certainty could no longer exist than whilst courts adhered to the established rules of construction. That expressions used in a will must have their legal effect; technical expressions are the measures of property in legal devises, and the law having fixed the meaning will not permit it to be perverted.

Shelley's case was one of the rules of construction. It had its origin in feudal policy, and though the reason had ceased, it had so long been the law of the land, it must continue such till parliament should interpose; and that it was equally applicable to a will as a deed.

Lord Mansfield said, that as the law had allowed a free communication of intention to a testator, it would be a strange law to say, "Now you have communicated that intention so as every body understands what you mean; but because you have used a certain expression of art, we will cross your intention, and give your will a different construction; though what you meant to have done is perfectly legal, and the only reason for contravening you is because you have not expressed yourself like a lawyer;" that his examination of the question always convinced him that the legal intention, when

clearly explained, was to control the legal sense of a term of art unwarily used by the testator. He agreed that the rule in *Shelley's case* was clear law, but could not affect this question when the testator's intention was clearly on the other side.

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In the king's bench judgment was given by the majority of the court that J. W. took an estate for life. A writ of error was brought to the exchequer chamber, where the judgment of the king's bench was reversed. All the judges gave their opinions *seriatim*, and there were seven for reversing and one (Ch. J. De Grey) for affirming. Mr. Justice Blackstone seems to have given the leading opinion, which Hargrave has preserved entire, (Har. Tr. 487.) I quote from Cruise, tit. 38, Devise, ch. 14, § 69. He says, "The great and fundamental maxim upon which the construction of every devise must depend is, that the intention of the testator shall be fully and punctually observed, so far as the same is consistent with the established rule of law, and no farther." He goes on to state that there are some rules of law which are great landmarks of property, which no testator can transgress, let his intention be ever so clear—such as the powers incident to the several kinds of estates. Other rules are mere rules of construction to ascertain the intention and meaning of parties, by annexing particular ideas of property to particular modes of expression. Thus a devise to a man generally gives him an estate for life; to a man and his heirs, gives an estate in fee; to a man and the heirs of his body, gives an estate tail.

The rule in *Shelley's case* is, that where the ancestor takes an estate of freehold with remainder to his heirs, or heirs of his body, the word "*heirs*" is a word of limitation of the estate, and not of purchase; that is, in other words, that such remainder vests in the ancestor himself, and the heir, when he takes, shall take by descent from him, and not as a purchaser. This rule may give way to the manifest intention of the testator, provided that intent be so fully expressed as to leave no doubt whether it was his intent or not; and he held that in that case there was no such plain and manifest intent as to control the legal operation of the words and be consist-

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ent with the fundamental rules of law. The question is not whether he intended his son should have only an estate for life; for he believed there never was an instance where an estate for life was expressly devised to the first taker, that the deviser intended he should have any more. But if he afterwards gives an estate to the heirs of the tenant for life, or to the heirs of his body, it is the consequence or operation of law that in this case supervenes his intentions, and vests a remainder in the ancestor. The true question of intent would turn, not upon the quantity of estate intended to be given to the ancestor, but upon the nature of the estate intended to be given to the heirs of his body. How did he intend the heirs should take? If as purchasers, that intent should be carried into execution; if as heirs by descent, or if he had formed no intention about the matter, then, by operation and consequence of law, the inheritance vested in the ancestor; and if the testator had not plainly declared his intent that the heirs should take an estate by purchase, and not by descent as heirs, then the rule of law must operate; for adherence to the rule of law is always presumed until the contrary is proved.

It is said in this case that the words *children* are words of purchase, and therefore Thomas Rogers, junior, took an estate for life only, and the children took the remainder. On the other hand it is contended that the whole devise must be taken together, and that the *habendum* clause is to explain, enlarge, lessen or qualify, though it cannot totally contradict or be repugnant to the estate granted in the premises; (2 Black. Com. 298;) that the devise in this case is imperfect without the *habendum*. An estate for life is clearly given to T. R. jun., but what estate is given to the children is not expressed in the premises, but is explained and enlarged by the *habendum*. By the premises a life estate at most in the children is created; but by the *habendum* it is shewn that an estate in fee was intended to be given, and is to the heirs of his body lawfully begotten. The children of T. R. jun. named in the given premises, are the heirs named in the *habendum*. There is, therefore, no repugnance between the premises and *habendum*; but both stand well together, and are not at all

inconsistent; and that under the rule in Shelly's case the devise in question gave to T. R. jun. an estate tail, which, by our statute, is converted into an estate in fee simple absolute. (1 R. L. 52.)

The authorities are numerous to shew that where an estate is devised to a man and his heirs, or to the heirs of his body, if the devisee die before the devisor, the devise is void; (4 T. R. 603, and cases there cited;) and the reason is because there is no person to receive the estate when it passes from the devisor at his death. The devisee being dead cannot take. His heirs cannot take; for by the devise itself they cannot take the estate as purchasers, but by descent only, through their ancestor; and his death precluding the possibility of his taking, prevents them from taking. (1 Pr. Wms. 398.) There are, however, many cases arising upon wills, where the true intention of the testator has been permitted to prevail, where the word *heirs* is so connected with or explained by the context, as to shew that it was not the intention of the testator to use the word *heirs* in its technical sense, as a word of limitation. In *Doc v. Goff*, (11 East, 617,) Lord Ellenborough says, "heirs of the body" are undoubtedly *prima facie* words of limitation, but they may be construed to be words of purchase where it is clearly so intended; and in that case he held that the words "heirs of her body" were equivalent, under the devise in that case, to *children or issue of her body*, and therefore to be construed words of purchase. In *Lessee of Findlay v. Riddle*, (3 Bin. 148,) the testator devised certain lands to John Findlay during his natural life, and after his decease, if he shall die leaving lawful issue, I give and devise [the premises] to his heirs, as tenants in common, and their respective heirs and assigns forever. It was held that John Findlay took only an estate for life, and not an estate tail. The rule in Shelly's case, and its application to such a case were considered, and the court felt themselves warranted in construing the word *heirs* as *children* and a mere *designatio personarum*. The testator in this case uses the word *children* in the premises of this devise, and *heirs of his body* in the *habendum*. We may therefore

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consider the latter words used by him to designate the persons named in the premises. If so, then an estate for life only was given to T. R. jun. and a remainder to the children of T. R. jun. after his decease, and of course the remainder vested in the children of T. R. jun. at the death of the testator. The testator intended to give Thomas a different estate from that which he gave to his son *James* ;* but unless the words *children and heirs* are thus construed together, the consequence will be that each of his sons took an estate in fee. The testator could not, for the reason just mentioned, have intended to create an estate tail in his son Thomas; and also because no such estate is recognized by our laws. And when it is said that wills must be consistent with the rules of law, the observation is not to be applied to the construction of words, but to the nature of the estates themselves. (2 Atk. 580.)

2. Is the codicil to be considered part of the will?

In the bill the complainants charge that if any codicil was made, it was prepared by Halsey Rogers, and signed by the testator when he was totally incompetent to make any testamentary disposition of his estate, and therefore it is void and should be set aside as fraudulent. In his answer, the appellant sets up the codicil as fairly and properly executed by the testator, he being then of sound mind and memory. Witnesses were examined as to its execution, and it appears that the paper was actually signed by the testator; but the balance of testimony certainly is, that he was incompetent at the time to transact any business. Chancellor Sanford must have held it to be void, though he has not said so in terms in his decree. It is now objected that it is not competent for a court of chancery to set aside a will or codicil on the ground of fraud, or incompetency of the testator, but that that question should be determined in a court of law on

* The devise to *James* follows the devise to *Thomas*, and is in these words: "Fourthly, I give, devise and bequeath unto my son James Rogers, and to his heirs and assigns, all that certain piece or parcel of land, &c. (describing the same) containing 200 acres, to have and to hold the said last mentioned premises, unto my said son James Rogers, his heirs and assigns, to his and their own proper use and behoof forever."

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an issue from chancery of *devisavit vel non* ; and such I apprehend is the general, if not invariable practice of the court in cases of real estate. Fraud, as to a will of personal estate in England, belongs to the jurisdiction of the spiritual court. (2 Rob. on Wills, 30. In this state, however, it is a proper subject of inquiry in the court of chancery. In *Pemberton v. Pemberton*, (13 Ves. 297.) Lord Eldon, on a motion to grant a new trial on an issue of *devisavit vel non*, said that the administration of equity in case of a will is very different from other cases, upon most of which equity determines upon inferences of facts as well as doctrines of equity. "But the authority to declare what is and what is not a man's last will is denied to this court." And to support this principle, *Kenrick v. Bransley*, (3 Brown's P. C. 358,) is cited, where a will of both real and personal estate had been held to be void on the ground of fraud in the court of chancery ; and on appeal to the house of lords the decree was reversed, on the ground, as is inferrible from the arguments of counsel, that the jurisdiction of deciding upon the validity of wills, whether obtained by fraud or not, so far as they relate to personal estate, belongs to the ecclesiastical court ; and so far as they relate to real estate, belong to a court of law. And so this case was understood by Lord Chancellor Rosslyn, in *Ex parte Fearon*, (5 Ves. 647.) The same point was adjudged in 2 P. Wms. 270. (2 Atk. 324.) That an issue is the proper practice of the court of chancery has been declared by the late Chancellor Kent, in *Van Alst v. Hunter*, (5 Johns. Ch. R. 148.)

The codicil in this case makes material alterations in the disposition of the property of the testator, but does not effect the devise to Thomas Rogers, junior, only by giving the executor power to sell real estate for the payment of debts. That power, however, does not appear to have been exercised by him. It seems to me, therefore, that there was no error in omitting to award an issue to determine the competency of the testator ; nor does it appear that an issue was asked for by either party.

3. Was the sale by virtue of the execution regular ? It is charged in the bill, that no consideration was paid for this

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judgment, and that it was obtained with a fraudulent intent of sacrificing the property of testator after his death. The fact, however, appears far otherwise. The testator had become indebted to his son James and gave his bond which was prosecuted by the executors of James, and the present appellant procured an assignment of it, at the request of his father, the testator ; and, so far as motives appear, for the commendable purpose of preventing a sacrifice of his father's property.

There is no evidence of any actual fraud in the sale, but the propriety or impropriety of such a sale must depend upon the general question, whether a trustee can be permitted, under any circumstances, to sell the trust property and become a purchaser at such sale. In the case of *Davoue v. Fanning*, (2 Johns. Ch. R. 252,) Chancellor Kent has reviewed the English cases, in which the rule has been long established that a trustee shall not be permitted, unless by leave of the court of chancery, to purchase the property of his *cestui que trusts*. This case indeed is unlike in its circumstances to those cases, but it seems to me not distinguishable in principle. The appellant, as executor, had the administration of the personal estate, and had that been sufficient for the payment of the debts of the testator, the duties of the executor, in character of trustee, would have been confined to the personal estate ; but by statute, when the personal estate is insufficient to pay the debts, it becomes the duty of the executor to make sale of the real estate, or so much thereof as shall be sufficient for that purpose, under an order of the surrogate. When it is ascertained that the personal property is insufficient to pay the debts, the executor's duty makes him, by virtue of his office, a trustee for the devisees and creditors. So far as the personal estate is concerned he may retain his own debt, and he shall be preferred to other creditors of an equal grade ; but when the real estate is to become assets and applied to the payment of debts, there is no preference, no distinction between specialty and simple contract debts. Had the appellant declined the character of executor, he might undoubtedly have pursued his remedy under his judgment and execution ; but he should

not be permitted as creditor to sacrifice, for his own benefit, that very property which his duty as executor requires him to protect, and dispose of to the best advantage of those entitled to the estate.

The case of *Sheldon v. Sheldon* (13 Johns. R. 220,) is an authority for this proposition, that he who undertakes to act for another in any matter, shall not, in the same matter, act for himself; therefore a trustee to sell shall not gain any advantage by being himself the person to buy. I am of opinion, therefore, that the sale by the sheriff was improper, and was correctly ordered to be set aside.

4. Were the notes barred by statute properly rejected by the master? Two of the rejected notes bear date in 1805, and the third in 1809, more than six years before the testator's death. An objection was taken before the master that these notes were barred by the statute of limitations, which objection was allowed, and the notes rejected.

It is not denied that an executor has a right to retain his own debt; this right of retainer arises from necessity; for as a person cannot sue himself, it follows that where the same person is both creditor and debtor, he must retain, or lose his debt. This right of retainer, being for the benefit of the executor, should not place him in a better situation than other creditors as to the kind of debts which he may retain. He can therefore not retain a debt which he could not recover if he stood as creditor simply, and not executor. The doctrine contended for, however, claims that the provision in the will for the payment of all *just debts*, revives every demand against the testator. This question has been long agitated in England where there are dicta on both sides, and it seems, so late as 1813, to have been a vexed question; but in the case of *Burke v. Jones*, (2 Vesey & Beames, 278,) the vice chancellor, Sir Thomas Plumer, has given the question a most elaborate investigation, and reviewed all the cases; and after having done so, he remarks: "I have now gone through all the cases that are to be found in print or manuscript upon this important question; and the result is, that there is not one in which this doctrine has been established to the full extent that has been contended; that it rests sim-

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ply upon dicta opposed by dicta, and has been disapproved by every judge from the time of Lord Hardwicke; that it is contrary to the decision in *Legastick v. Cowne*, (Mosely's R. 391,) and to the final decision in Lord Strafford's case, followed by the ultimate decision of Lord King, who first determined that case, and substantially contradicted by every subsequent authority." The fair interpretation to be given to such a clause in a will is, as is remarked by the vice chancellor, that such debts are to be paid as shall turn out to be just debts. The executor is to take the ordinary course in the investigation of them under the direction of the courts of law and equity. Lord Redesdale, (1 Sch. & Lef. 109,) has laid down a rule which has received the sanction of the vice chancellor of England and of Chancellor Kent, (6 Johns. Ch. R. 294.) It is this: "That a device in trust for payment of debts does not prevent setting up the statute if the time had run before the testator's death; for if it has run in the life of the testator, the debts are presumed to be paid: but where a provision is made by will for the payment of debts, the statute does not run after the death of the testator; it is an acknowledgment of the debt." That is, every demand which was a legal one at the death of the testator shall be paid; but a debt barred by the statute in the life of the testator is presumed to have been paid by him, and therefore is not a legal demand or a just debt. This seems to be a fair and equitable construction of such a clause. It has received the sanction of high authority, and is not opposed by any adjudication. It should therefore, in my judgment, be considered the law of the land. The decision of the master was therefore correct, and the second exception was properly disallowed.

5. Was the appellant properly charged with the property delivered to the widow? The rule of law undoubtedly is, that the personal estate shall be first applied in the payment of debts before the real, even where the testator expressly directs the real estate to be sold for that purpose. (Toller, 417, 18.) Nothing but an express declaration or plain manifestation of intention will exonerate the application of the personal estate before the real. (18 Ves. 138.) Chancellor Kent

says: "It is too well settled to be questioned, that the personal estate is to be first applied to the payment of debts and legacies, and that a mere charge on the land will not exonerate the personal estate, nor any thing short of express words or a plain intent in the will of the testator." (3 Johns. Ch. R. 319.) These authorities are express, and are not contradicted. There is nothing in the will itself which gives the executors power to sell the real estate. The codicil gives that power, but even that contains nothing to shew the intention of the testator that the land should be sold before the personal estate was exhausted in the ordinary course of administration.

6. The only remaining question is, whether the appellant ought to have been charged with costs. The question of costs rests in the sound discretion of the court. A trustee will not, in general, be charged with costs, unless there has been corruption or gross negligence. (6 Johns. Ch. R. 411.) In this case, I cannot say that any thing like fraud has been proved. The appellant proceeded to collect his judgment, as he supposed he had a right to do, by selling the land upon execution at public sale; and he might well suppose, as it was manifest, that the real estate must be sold in some way, that it might bring as much at sheriff's sale as if sold by order of the surrogate, or by himself under the power in the codicil. When the complainants were dissatisfied, he shewed every willingness to explain all his conduct in the course of his administration; and before the bill was filed, he offered to give up his purchase of the real estate if the other heirs would pay him their several portions of his just claims against the estate. This offer was rejected. When called on by Cotton, on behalf of the complainants, he denied their right to the lot, but offered to render an account of the estate, and a time was appointed for that purpose, but the complainants never attended. I can see nothing in the conduct of the appellant to shew any intention to sacrifice the property. It was indeed sold for much less than its value, and so it probably would have been if sold by order of the surrogate; but in that event the executor should not be held chargeable

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with fraud from such a circumstance. It seems to me, therefore, that the costs should have been paid out of the fund.

On the whole case, therefore, I am of opinion that the children of T. R. jr. took an estate in fee in the property specifically devised to him, and that the chancellors were correct, 1. In setting aside the sale by the sheriff as contrary to law ; 2. In disallowing the second exception, and thereby excluding the notes barred by the statute ; 3. In charging the executor with the whole of the personal property, not excepting that specifically devised to the widow ; 4. In rejecting the codicil, as it had no effect in determining the rights of the complainants. But I am of opinion that the costs should not have been charged to the appellant but to the fund, and that therefore so much of the decree of the chancellor as charges the appellant with costs ought to be reversed, and that the residue thereof should be affirmed.

By Mr. Justice MARCY. The form of the devise to Thomas Rogers, junior, is somewhat unusual. It has a clause corresponding to what is called an *habendum* in a deed, and the difficulty in expounding it arises, I apprehend, from an apparent discrepancy between the *premises* and the *habendum* clause. If the language of this clause had conformed to that used in the premises, Thomas Rogers, junior, could have taken only an estate for life, and at his decease his children would have taken the property devised to him, not as his heirs but as devisees under the will of their grandfather ; and if the language in the *premises* had been like the *habendum*, he would have taken, if he had survived the testator, a fee, and his children could have derived no title to the property mentioned in the devise otherwise than through him. They must have taken by descent in the latter case, and not by purchase as in the former.

It must be assumed that the testator intended that those who took should hold ; the word *heirs* in the *habendum* must therefore be construed to mean what the word *children* does in the premises. I am not about to enter on the consideration of that boundless theme of discussion, the rule in Shelley's case, or rather the application of it, because I do not imagine that this case necessarily involves many of the nice

distinctions which so often attend the application of that rule. The rule itself is not now, perhaps has never been, since it was first laid down, much in dispute, although it is admitted that the reason on which it was founded has long since ceased to exist. It has been expressed in language somewhat various by different judges and lawyers, but its import is alike understood by all. In Coke's report of *Shelly's case* it is stated in these words: "Where the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, that always in such cases *the heirs* are words of limitations of the estate, and not words of purchase." (1 Rep. 104 a.) It is thought by an eminent elementary writer to be more precisely and clearly expressed by Sergeant Glynn, who says that "in any instrument, if a freehold be limited to the ancestor for life, and the inheritance to his heirs either mediately or immediately, the first takes the whole estate; if it be limited to the heirs of his body, he takes a fee tail; if to his heirs, a fee simple." (1 Prest. on Est. 265.) It may be proper here to remark, that our statute abolishing entails turns every fee tail into a fee simple.

In a legal sense, the word "heirs" is *ex vi termini* a word of limitation, and is of a different import from the words "child" or "children," "son" or "sons," or "issue," which signify a description of persons who usually take under a will or deed as purchasers. Notwithstanding the technical meaning of these terms when introduced into legal instruments is well settled, it frequently happens that the words *child* or *children*, *sons* or *issue* are construed to be words of limitation, and I believe more frequently, the words *heir* or *heirs* are taken to be words of purchase. Why have the same words of well ascertained technical meaning received a different interpretation? The only answer that can be given to this question is, that the intention of the testator has appeared so manifest by other words used along with these that the technical signification could not be given to them without defeating that intention. It is true, we arrive at the intention of the testator by means of the words he uses, and we arrive at the meaning of

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words which have various significations by their context ; these changing significations given to the same terms arise from the application of well established rules of interpreting devises. Lord Hale says, that the true ground of decision is the intent, and the true question is, what is the intent ? and the interpretation is to shew the intent. (1 Vent. 214.)

Some of the cases to which the rule in *Shelly's case* has been applied, have violated, it is supposed, this canon of interpretation. The case of *Coulson v. Coulson*, (2 Str. 1125, 2 Atk. 246,) and that of *Perrin v. Blake*, (4 Burr. 2579.) first decided in the king's bench, and subsequently reversed in the exchequer chamber, are of the description of cases wherein the courts have allowed the intention of the testator manifestly appearing in his will to be overruled, by adhering pertinaciously to the technical meaning of the word "heirs." There are many others, such as *Long v. Laming*, (2 Burr. 1100,) and *Bagshaw v. Spencer*, (1 Ves. sen. 142, 2 Atk. 517,) where *heir* or *heirs* have been construed to be words of purchase. The signal failure, after all the mighty efforts which have been made to draw a clear line of distinction between those cases which admit and those which exclude the application of the rule in *Shelly's case*, is to be traced, I think, to an irreconcilable conflict between two canons of interpretation—between that which requires the intention of the testator to be effectuated, and that which adheres to the technical meaning of legal terms in manifest opposition to that intention. This confusion or uncertainty is probably to be ascribed as much to the intrinsic difficulty of the subject as to any striking defectiveness in the rules. The remarks of Mr. Christian, the learned editor of Blackstone's Commentaries, on this subject, appear to me to be exceedingly just. He says, that "where technical phrases and terms of art are used alone by a testator, it is fair to presume he knew their artificial import and signification, and that such was his will and intention ; but when he happens to introduce them, and at the same time in effect declares that, 'I do not intend what conveyancers understand by these words, but my intention is to dispose of my estate directly contrary to the construction put upon them,' courts of justice are or ought to be

as much at liberty, or rather under an obligation, to effectuate that intention as far as the law will admit, as if it had been expressed in the most apt and appropriate language." (2 Black. Com. 381, note.) Mr. Justice Buller, who, I believe, has gone about as far as any judge in favor of setting up the technical meaning of terms against the testator's intention, admits that this intention must prevail. He repeats and adopts the language of Lord Hardwicke, that "there can be no magic or peculiar force in certain words more than others," and that "their operation must arise from the sense they carry." He further remarks, in the case of *Hodgson v. Ambrose*, (Douglass, 338,) that "there is no better rule established than that the intention of the testator expressed in his will, if consistent with the rules of law, shall prevail. That is the first and great rule in the exposition of all wills, and it is a rule to which all others must bend." Lord Alvanley made some remarks in the case of *Poole v. Poole*, (3 Bos. & Pul. 627,) on the subject of interpreting devises, which appear to me to be full of sound law and good sense. "But it appears to me, (he says,) that in construing limitations of this sort, the courts have never deviated from the general rule which gives an estate tail to the first taker where the devise to him is followed by a limitation to the heirs of his body, except where the intent of the testator has appeared so plainly to the contrary that no one could misunderstand it." Again, he says, in the same case, "I take the rules respecting the construction of words in a will to be plain and well settled. Words are always to be taken in their ordinary sense, unless the testator has demonstrated an intention to put a different sense upon them." Lord Mansfield, after an able and extensive review of the cases in which similar terms have been differently construed to meet the intention of the testator, concludes that "*There is no rule of law that prevents heirs being taken as purchasers, where the intention of the testator requires that they should do so.*" After all that has been said upon this subject in the numerous cases to be found in the books, we are ultimately sent back to the will itself, with directions to search it for the testator's intent, and in doing this to give to ordinary words their ordinary acceptation, and to legal

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phrases their technical import, unless we thereby overrule the testator's meaning otherwise clearly manifested. In cases of probable or doubtful intention, legal terms are to have their legal signification ascribed to them.

I will now consider the devise to Thomas Rogers, jun. with a view to see if the intention of the testator is not so plain that no one can misunderstand it. If we look only at the premises of the devise, we shall see that no language could have been selected to express more clearly than that which the testator has used, an intention to convey only a life estate to his son Thomas. The property is given to him *for and during his natural life*, and after his decease *to the children of his body lawfully begotten*. This is uncommonly explicit; probably no language could make it more so. What is there in any other part of the will to abrogate this devise, and defeat an intention so plainly and so appropriately expressed? The *habendum* clause drops the word *children*, and substitutes therefor the word *heirs*. By that clause, Thomas Rogers, jun. is to hold *for and during his natural life*, and after his decease the property is to go to the heirs of his body lawfully begotten, and to their heirs and assigns forever. If I do not mistake the use and the effect of the *habendum*, it cannot defeat what is done by the premises. This clause, as has been before observed, is not usually found in a devise distinct and separate from the premises; but where it is so found, it is not, I presume, to have a greater effect than in a deed. In a deed it can never defeat the grant; it may enlarge, qualify and abridge it, but so far as it is repugnant to the premises it is void. (4 Cruise, tit. Deed, ch. 20, § 77.) Land given in the premises of a deed to a person and his heirs, *habendum* to the grantee for life, the *habendum* is void. (Plowden, 153.) Cruise says, "The words inserted in the *habendum* for the purpose of shewing the quantity of the estate intended to be given, are called words of limitation in contra-distinction to the words in the premises by which the lands are given, and which are called words of purchase." (4 Cruise, 229.) The limitation here mentioned refers to the estate, and not to the grantees, though their names are usually repeated in the *habendum*.

The office of the premises in a deed of feoffment, as Lord Coke says, is to express the grantor, grantee and thing to be granted, and the office of the *habendum* is to limit the estate. (Buckler's case, 2 Rep. 55, a.) Where the *habendum* contains a person not named in the premises as grantee, such person is, generally speaking, a stranger to the deed, and can take nothing under it. (4 Cruise, 226.) These authorities disclose fully and clearly the office of the *habendum*; its appropriate use is to regulate the tenure of the thing given, but not to designate the persons who are to take, and we have seen in one instance that it was held void, because it was repugnant to the premises in what related to the tenure of the estate. The premises gave a fee, the *habendum* a life estate, and the grantee was adjudged to be entitled to a fee. If it is not permitted to control absolutely in what relates particularly to its office, *a fortiori*, it will not control those things to which it was not designed to have any particular relation. If lands are limited to A. for his life, remainder to his first and other sons and the heirs of their bodies, or remainder to the child or children of A. and the heirs of their bodies, no more than a life estate will vest in A., and the words *son*, *child*, or *issue* will be construed words of purchase. (Cruise, tit. 32, ch. 22, § 28. Apply this doctrine, which is too well established I apprehend to be controverted, to the devise we are now considering. By express words the land is given to Thomas Rogers, junior, for and during his natural life, and after his decease to his children. The word *children*, in its legal sense, is a word of purchase, and the same rule of interpretation applies to it that is applicable to the word *heirs*. We are required to go as far in order to give a legal sense to the one as to the other. If they are in direct opposition to each other, they neutralize the force of the rule; in that case we should be at once relieved from all embarrassment, and should not hesitate to pronounce the testator's meaning to be what he said it was, that his son Thomas should take the property for and during his natural life, and his children after him. There is nothing in the other parts of the devise or the will that indicates to me the slightest intention in the testator to use the word *children* in any other sense than that

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of its legal import, except what may be inferred from the language of the *habendum*; but we have seen that this clause has nothing to do in pointing out the persons who are to hold; it only designates the tenure by which they shall hold.

I have already adduced an authority to shew that where a fee is given in the premises, the *habendum* cannot defeat it. So where the land is given to two, *habendum* to one for life, remainder to the other for life, the *habendum* is void. (4 Cruise, 228.) This proceeds undoubtedly upon the principle, that what is completely and effectively done in the premises can not be defeated by the *habendum*. It should not be forgotten that the children of Thomas Rogers, junior, are as clearly designated in the premises to be devisees as their father is. To make this matter clearer, if possible, let us suppose that instead of the children being named to take the estate after the death of their father, a third person had been inserted, would the omission of his name in the *habendum* have defeated the devise to him? Placing myself upon the authorities, I do not hesitate to say it would not; and if it would not in such a case it would not in the case of the children. Where the premises and the *habendum* are equally clear, the former will not be controlled by the latter, but both will be allowed to have an operation. (4 Cruise, 229.)

It is not my intention to intimate that the *habendum* should be overlooked; it is as much a part of the devise as the premises, that they should be viewed together: *ex antecedentibus et consequentibus fit optima interpretatio*. It is a rule both in law and equity, so to construe the whole deed or will that every clause shall have its effect. If in pursuance of this rule of interpretation we attempt to make the two clauses, of the devise harmonious, we utterly fail by considering the word *children* as synonymous with the word *heirs* in its technical sense. Such a construction of that word renders the clause, "for and during his natural life and to the children of his body lawfully begotten after his decease" in the premises, and the clauses, "for and during his natural life and after his decease," and also "to their heirs and assigns forever," in the *habendum* wholly inoperative and useless; for neither of them is necessary to give a fee to Thomas Rogers, junior.

These or nearly all of them are important and effective words, and could not, in my opinion have been introduced as mere formal language. This is made quite evident by looking to the subsequent devise in the will. It is placed beyond a reasonable doubt by the different phraseology used in the two devises, that the testator meant to give an estate to his son James different from that which Thomas was to take; yet if the word *children* is to be taken as synonymous with *heirs*, the kind of estate given by each will be the same. This striking difference of language in a matter where uniformity of intention generally begets uniformity of language, can only be ascribed to a difference of intention.

I admit that the language in the *habendum*, if in the premises, would convey, according to the rule of construction which prevails in England, an estate in tail, which, by our statute, would be instantaneously converted into a fee simple; yet there is enough to shew, even in this language, that such a construction would be against the intent of the testator. Unless a life estate was contemplated, the words in the *habendum* "for and during his natural life," are useless and senseless. Such, also, would be the case with the words in the same clause, "and to their heirs and assigns forever," unless we suppose the testator intent upon creating an estate abhorred by the policy of our government and abolished by our laws, an estate tail.

But suppose we do what, by acknowledged rules of construction, is to be done when the intention of the testator demonstrates the necessity of it, convert the word "heirs" in the *habendum* into a word of purchase, all the difficulties will at once vanish; then no phrase used by the testator is inappropriate, no word is useless. This may be, and indeed is to be done, according to the opinions of Lord Alvanley and Lord Mansfield, where it is necessary to carry into effect the intention of the testator rendered so plain by other parts of the devise or will that no one can misunderstand it. This intention is demonstrated as clearly as any thing that regards human intention can be demonstrated. It is demonstrated by the uncontradicted and unrevoked declaration, that Thomas Rogers, junior, shall take for and during his natural life,

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and that his children lawfully begotten shall take after his decease. By construing the word "heirs" in the *habendum* to be a word of limitation, we shall defeat what all, I believe, will acknowledge to have been the evident intention of the testator; we shall render several phrases used by him inappropriate and useless, in violation of a known rule of construction; we shall, in effect, strike out of the devise the word "children," or strip it of its legal import, for which it has as just and strong a claim as the word "heirs;" and we shall make the testator create against his intention an estate tail, which is not known to or tolerated by our laws. On the other hand, by construing the word "heirs" in the *habendum* to be a word of purchase, we carry into effect what is, in my view, the demonstrated intention of the testator; we assign an appropriate meaning to all the language he has used, and make every part of the devise harmonize.

By the foregoing views I am brought to the conclusion, that the devise to Thomas Rogers, junior, was intended to give, and in fair construction of law could give only a life estate to him, and the remainder was intended to go to his children in fee. The son dying before the testator, the devise to him lapsed, but his children take, not by descent from him, but under the will as the designated objects of the testator's bounty.

As to the other questions in the case, Mr. Justice MARCY expressed, generally, his concurrence in the disposition made of them in the opinion delivered by the Chief Justice.

Mr. Justice SUTHERLAND concurred in opinion with the CHIEF JUSTICE, and particularly expressed his concurrence in the views of Mr. Justice MARCY on the question of the construction of the devise.

By Mr. Senator S. ALLEN. 1. In my view of the subject, the decree which set aside the sale under the judgment was correct. No necessity existed for the sale of the land by execution; the estate being amply sufficient for the payment of the debts of the testator, including that due Halsey Rogers, he ought, as executor, to have adopted the remedies pointed out by the chancellor, by which not only his interest would

have been secured, but also that of others for whom he was acting as trustee.

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2. The disallowance of the three notes of hand, on the ground that they were outlawed, in my opinion was incorrect. The statute is no bar where there are circumstances un rebutted to take the case out of its operation. (*Kane v. Bloodgood*, 7 Johns. Ch. R. 360.) What are the circumstances in this case? The transaction was between the father and his son, and a son too, upon whom the father appeared principally to rely. The execution of the notes was proved to the satisfaction of the master, and there appears no evidence to disprove the fact that the debt was justly due the appellant. The frequent loans in money made by Halsey Rogers to his father, the charges for which were also rejected by the master in the first instance, though afterwards allowed, are evidence, presumptive at least, that the notes were unpaid. Halsey Rogers had no reason to suppose that his father would take advantage of the act of limitation, and it would have been indelicate in him to have harbored such a suspicion, or to have shewn it, by requesting a renewal of the responsibilities; he was the sole executor or trustee of the estate, and if these notes had been held by any other person, and he as executor had promised to pay them, although they might, previous to such promise, have been barred by the statute, such promise would have renewed the debt. (*Smith v. Ludlow*, 6 Johns. R. 267. *Johnson v. Beardslee*, 15 Johns. R. 3.) and if so, why may not Halsey Rogers, as executor, have made a promise to the above effect to H. R. as creditor of the estate. My conclusion is, therefore, that the debt is just, and that the notes ought to be allowed with interest.

3. As to the charge against H. Rogers of \$528,25 for timber cut and rent received, on the lot devised to Thomas Rogers, junior. Being of opinion, that the sale of the land under the the judgment was illegal, and as Halsey Rogers will be allowed interest on the debt due him on that judgment, it is but justice that he should repay the money he may have received, both for the rents and the products of the land thus devised.

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4. The exception taken by the appellant to the master's report, charging him with the sum of of \$703,16, the value of the household furniture and other personal estate bequeathed by the testator to his widow, and left by the appellant in her possession, appears to me to be well taken and that it ought to be sustained.

Whenever the intention of the testator can be fairly ascertained, such intention ought to be carried into effect. That it was the intention of Thomas Rogers, senior, to leave his widow the full enjoyment, use and benefit of his household furniture, &c. during her natural life, cannot be disputed; and yet the effect of the decree is, to deprive her of such use at the end of one year after the death of her husband. It appears to me also, that the fact of executing a codicil to the will is an evidence of this intention; for it is pretty evident from the exhibit of the situation of the testator's affairs at his death, that between the making of the will in 1803 and of the codicil in 1816, the circumstances of the testator had materially altered. In 1803 the personal estate, over and above what was bequeathed to his wife, may have been sufficient for the payment of all the debts he owed, or what he may have thought he was likely to owe; and therefore he deemed it unnecessary to give any authority to his executors to sell his real estate for that purpose: but, in 1816, it appears these debts had increased to a considerable amount, and finding that his personal estate, over and above what he had bequeathed to his wife, would be insufficient, he authorized his executor by the codicil to his will, to sell and dispose of so much of his real estate as would be necessary for the payment of his debts.

My opinion therefore is, that the several decrees of the court of chancery ought to be affirmed, except so far as they disallow the payment of the three notes with interest, due from the estate of Thomas Rogers, deceased, to Halsey Rogers, the executor of his estate, and except so far as Halsey Rogers is charged with the personal property left by the testator to his widow; and that the decrees be modified accordingly.

Mr. Senator MAYNARD concurred in the opinion delivered by the Chief Justice upon the main questions in the case, but differed with him upon the question of costs. The liability to costs, he said, depended upon the intent with which the acts of the appellant complained of in the court below were done; that is, whether they were fraudulent or not. Those acts were illegal, and their illegality is evidence of intent. The appellant expressed a willingness to account, accompanied however by a denial of the right of the complainants. His offer to account amounted to nothing, and ought not to excuse him from the payment of costs. He was therefore of opinion that the several decrees of the court of chancery appealed from ought to be affirmed, and with costs to be paid by the appellant.

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Mr. Justice SUTHERLAND approved of the suggestion of Mr. Senator Maynard, that costs should follow the affirmation of the decrees, not on the ground of fraud, but because the appellant, in the offers made by him to account, had preferred unfounded claims, viz. the notes barred by the statute. The complainants were compelled to file their bill. Had the appellant offered to settle with the respondents on terms such as the court of chancery or this court would have approved, the respondents would not have been entitled to costs. As it is, however, costs should be allowed to them.

Senators MATHER and THROOP also expressed their opinions that the decrees should be affirmed, with costs.

In the final decision of the cause, the following questions were put and decided.

1. Ought the exception to the master's report, in rejecting the notes claimed by the appellant Halsey Rogers, to have been allowed by the chancellor? In the affirmative, 2 viz. Senators S. ALLEN and TODD. In the negative, 17.

2. Ought Halsey Rogers, the appellant, to be charged with the property specifically bequeathed to the widow, and left by him in her possession? In the affirmative, 18. In the negative, 1, viz. Senator S. ALLEN.

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3. Shall the several decrees appealed from be affirmed or reversed, saving the question of costs? For affirmance, 17. For reversal, 2, viz. Senators S. ALLEN and TODD.

4. Shall the appellant pay costs? In the affirmative, 15. In the negative, 4, viz. Chief Justice SAVAGE, Mr. Justice MARCY, Senators TODD and WHEELER.

Whereupon the several decrees of the court of chancery appealed from in this case, were ordered, adjudged and decreed to be affirmed, with costs to be paid by the appellant to the respondents.

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SPENCER STAFFORD, SURVIVOR, &c. *appellant*, and JOHN  
BRYAN, *respondent*.

An acknowledgment which is to have the effect of taking a stale demand out of the operation of the statute of limitations, ought to be clear and explicit in relation to the *subject* or *demand* to which it refers.

If effect can be given to the declarations or admissions which may be proved to have been made by a defendant without referring them to the demand upon which the suit is brought, they will not be considered as referring to such demand, and as evidence of a new promise to pay it; and especially will they not be so considered where the defendant, in an answer to a bill of discovery, denies under oath that he has ever acknowledged or promised to pay the demand.

An answer in chancery, responsive to and fully denying a material allegation in a bill, will prevail, unless it be disproved by more than one witness

**ERROR** from chancery. In December, 1826, the appellant, as the survivor of the firm of Staffords and Spencer, filed a bill of discovery in the court of chancery, alleging the making of a promissory note by the respondent to the firm of Staffords and Spencer, for the sum of \$821,24, bearing date the 14th June, 1814, and payable on demand, alleging the loss or destruction of the note, and averring several acknowledgments of the note or new promises made by the defendant within a year before the filing of the bill, and particularly stating an offer made by an authorized agent of the respondent in August or September, 1826, to pay the face of the note. The bill concludes by praying a discovery and an account to be taken, &c.



The respondent in his answer, admits the making of the note, but claims and insists upon the benefit and advantage of the *statute of limitations*, as if the same had been pleaded in bar to the relief sought. He avers that the note had been fully paid, but when particularly, and how, and by whom, and to which of the co-partners (of the firm of Staffords and Spencer) it was paid, he, on account of the length of time which has elapsed, cannot recollect. He denies having, within six years before the filing of the bill, acknowledged the debt or promised to pay it. He admits that in August or September, 1826, he requested his counsel (a suit at law being then pending on the note in question) to ascertain from the appellant whether he would accept an endorsed note for the sum of \$800 as *peace money*, and not by way of compromise or settlement of the demand, averring to his counsel at the time, and instructing him so to say to the appellant, that the note in question was fully extinguished and discharged. He states that upon that occasion he did not authorize his counsel to say that the \$800 note would be given or endorsed by way of compromise or otherwise, in case the appellant was willing to take the same, intending to reserve to himself the right to buy his peace in such other manner as he might see fit; that he was induced to this course from an apprehension that the appellant might, though contrary to the fact, prove some declaration or admission which would subject him to the payment of the whole note, with interest. He admits that he was informed that an interview took place between his counsel and the appellant, and that the appellant refused to accept less than the whole amount of his demand.

Proofs were taken in the cause. The counsel of the respondent, referred to in the answer, was examined, and verified the account given of the negotiation with the appellant in August or September, 1826. Three witnesses, (Joab Stafford and Spencer Stafford, junior, sons of the appellant, and Lewis Benedict,) contradicted the answer in respect to the acknowledgment of indebtedness by the respondent. Joab Stafford testified that in the winter of 1822, '3, he and a Mr. Peckham called at the store of the respondent to purchase fur caps, and that he told the defendant (the respondent here)

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that he had not brought any money with him to pay for them, and that the defendant replied, *that neither he nor any of his father's family need to bring any money with them when they came to purchase goods of him, as there was an old business between him and the complainant, (the appellant here) and the defendant was owing him a good deal of money, more probably than he could ever pay, and that therefore they had better take it out in furs.* Spencer Stafford, junior, testified that in the years 1821, '22 and '23, he was in the habit of calling at the defendant's shop every winter and purchasing fur caps and buffalo skins, and the defendant would never take any money in pay from him, alleging as a reason *that the defendant owed deponent's father, who is the complainant, a large sum of money,* and this was his best and easiest way to pay it. Lewis Benedict testified that in March, 1819, he presented the note in question to the respondent for settlement, and that the respondent then *agreed to give a note in renewal payable in September then next,* but subsequently declined to do so.

It appeared in evidence that the complainant, Spencer Stafford, had been connected with divers persons in business: the names of the firms with which he was thus connected of course had, from time to time, changed, in all of which, however, his interest continued. On the books of Stafford and Spencer, the first of those firms, an account against the respondent was balanced on the 17th March, 1815, subsequent to which there was an item of charge under date of 18th April, 1815, to the amount of £2.2.0; and the next and last charge was of the date of 14th February, 1817, in which the note in question was debited to the respondent. The next account was in favor of the firm of Staffords, Spencer & Co. commencing in May, 1815, and ending in March 1819, the balance of which against the respondent was £50.15.6; and next an account was opened against the respondent by the firm of Spencer, Stafford & Co. commencing in December, 1822, and ending in December, 1823, the balance of which against the respondent was £18.3.0. On the other hand, it appeared that the respondent had an open, unsettled account against the complainant, commencing in November, 1815,

and ending in September, 1827, amounting to the sum of \$235.77.

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The cause was heard by Chancellor WALWORTH on the pleadings and proofs, and in October, 1828, he dismissed the bill with cost. The reasons of his decision will be found in 1 Paige's Ch. R. 239. The complainant below appealed.

*J. Lansing*, for appellant.

*S. Dutcher, jun.* for respondent.

Mr. Justice SUTHERLAND delivered the following opinion:

The answer of the defendant being responsive to and fully denying every material allegation in the bill must prevail, unless it be disapproved by more than one witness. Joab Stafford and Spencer Stafford, junior, the sons of the appellant, are the only witnesses who contradict the answer with respect to the acknowledgment of indebtedness by the defendant within six years. It will be observed that neither of these witnesses pretend that the note in question, or any other note, was mentioned by the defendant, or expressly alluded to by him; he only admitted, in general terms, that he owed the complainant a large sum of money, without specifying whether it was by bond, by note or general balance of accounts. What, in the opinion of the defendant, would constitute a *large sum of money*, we have no evidence to determine; no expression can be more vague and indeterminate. Its meaning would be entirely different when used by different persons, or even by the same person under different circumstances. It would be unsafe, therefore, to give to this epithet any peculiar significance. The admission of the defendant, then, was that *he owed the complainant*. It is unnecessary to determine whether this would be a sufficient acknowledgment of the note, under any circumstances, to take it out of the statute of limitations, because the evidence in the case shews that there was at that time an unliquidated account of long standing and to a considerable amount between the parties, to which the defendant may have referred, if in truth he made the declaration imputed to him by the witnesses. How the balance of the account stood at that time does not clearly

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appear. It was an unsettled account, and the defendant may have supposed himself the debtor, though the fact might have been otherwise; the testimony of these witnesses, therefore, is not necessarily incompatible with the truth of the defendant's answer. He may have made the declaration imputed to him, and still never have intended to admit the existence or justice of *the note in question*. An acknowledgment, which is to have the effect of taking a stale demand out of the operation of the statute of limitations, ought to be clear and explicit in relation to the subject or demand to which it refers. The acknowledgment or new promise is to be affirmatively established by the plaintiff, and if effect can be given to the declarations or admissions, which may be proved to have been made by a defendant, without referring them to the demand upon which the suit may have been brought, they ought not to be considered as referring to such demand, and as evidence of a new promise to pay it; but most especially they ought not to be so considered when the defendant denies under oath that he has ever acknowledged or promised to pay the demand.

It is said by the supreme court of the United States in *Bell v. Morrison and others*, (1 Peter's R. 351,) that where a new promise is to be raised by implication from the acknowledgment of the party, such an acknowledgment ought to contain an unqualified and direct admission of a present subsisting debt, which the party is liable and willing to pay; if there be accompanying circumstances which repel the presumption of a promise or intention to pay, and if the expression be equivocal, vague and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may effect different minds in different ways, they ought not to be considered as evidence of a new promise to revive the cause of action. Any other course would open all the mischiefs against which the statute was intended to guard innocent persons, and expose them to the danger of being entrapped in careless conversations and betrayed by perjuries. Although I cannot yield my assent to all the points decided in that case, nor to all the reasoning and positions advanced by the learned judge who delivered the opinion of the court, the general views to which I have alluded appear to me to be sound and

impressive, and to apply with considerable force to the case now under consideration.

But the testimony of these witnesses is not entirely unimpeached. Francis Bryan, the son of the defendant, swears that the fur caps purchased by the complainant's sons were purchased of him when his father was not present; and it appears, from the original entries in the defendant's books, that the articles were charged directly to the sons, and not to their father, the complainant. The circumstances stated by this witness, although not absolutely irreconcilable with the testimony of the Staffords, would nevertheless be entitled to some weight in a case depending upon the nice and accurate balance of evidence. But it is not necessary in this case to resort to such an analysis, as I am of opinion, for the reasons which I have already assigned, that admitting the testimony of the Staffords to be entirely unimpeached, it does not shew a sufficient acknowledgement of the note in question to take it out of the statute.

The testimony of the counsel referred to in the answer confirms, in every essential particular, the answer of the defendant, so far as relates to the motives and circumstances of the attempt which he made to effect a compromise with the complainant through the witness; it was obviously an effort to purchase his peace, and not an acknowledgment of the legal existence or justice of the claim.

In relation to the acknowledgment testified to by Mr. Benedict, it is only necessary to remark, that it was made in March, 1819, and the bill in this case was filed in December, 1826, nearly eight years after the acknowledgment. Admitting it to have been made, therefore, it is no evidence of a new promise within six years. This suit has no connection with the suits at law which were previously commenced.

I have taken no notice of the allegation and evidence in relation to the embezzlement or destruction of the note in question; the fact is positively denied under oath by the person accused, and the defendant also denies all knowledge of the fact, or that the note ever came to his possession. Whatever ground, therefore, the circumstances of the case might

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have afforded for suspicion, the fact must be considered as legally disproved.

I see nothing so peculiar in the circumstances of this case as to exempt the unsuccessful party from the payment of costs, which was asked for on the argument of this case, in case the court should be of opinion that the decree of the chancellor ought to be affirmed. I am therefore for affirming the decree below, with costs.

Chief Justice SAVAGE and Mr. Justice MARCY expressed their concurrence in the opinion delivered.

Mr. Senator S. ALLEN also concurred, briefly stating the reasons of his opinion.

Whereupon, it was unanimously ordered, adjudged and decreed that the decree of the chancellor be in all things affirmed, and that the appellant pay to the respondent his costs to be taxed.

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RICHARD ABRAHAM, impleaded, &c. *appellant*, and C. B. PLESTORO and others, *respondents*.

An *assignee* under a foreign commission of bankruptcy is not entitled before judgment to an *injunction* to restrain the *bankrupt* from receiving from the custom house here, property which was on the high seas on board a vessel, on its way from England to New-York at the time of the suing out of the commission. *Per curiam*.

An assignment under the bankrupt law of England does not operate a legal transfer of the personal property of the bankrupt in this country, even as between the *assignee* and the *bankrupt*. *Per* MAYNARD, OLIVER and STEBBINS, *senators*.

If the property be on board a *British* vessel on the high seas at the time of the suing out of the commission, and thus within the jurisdiction of England, it passes by the assignment; but if so, the fact must be distinctly averred, and will not be presumed. *Per* MAYNARD and STEBBINS, *senators*.

The assent of a bankrupt to a statutory assignment of his property is not to be presumed, while the proceedings are yet *in fieri*. *Per* MAYNARD and OLIVER, *senators*.

If the same effect be given to a *statutory assignment* as to a voluntary conveyance, the assignee is not entitled to an *injunction* before judgment. *Per* OLIVER, *senator*.

*Principles contained in the opinions of Mr. Justice MARCY and Mr. Senator THROOP, dissenting from the opinion of the majority of the court.*

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1. An assignment under a commission of bankruptcy sued out in England against a *British* subject, domiciled in that country, divests the bankrupt of personal property of which he is possessed in *this country* and transfers it to the assignee. So property in a vessel on the high seas in like manner passes. *Per MARCY, J. and THROOP, senator.*
2. An *injunction* may properly issue from chancery in such case to restrain a custom-house officer, into whose hands the property comes, from delivering it to the bankrupt. *Per MARCY, J. and THROOP, senator.*
3. The same effect should be given by our courts to a *statutory* assignment under a foreign act of bankruptcy as to a *voluntary* assignment, where all the parties are subjects of the country under the laws of which the assignment is made, and their rights grow out of contracts made within the jurisdiction of their own government. *Per MARCY, J. and THROOP, senator.*
4. Personal property is without locality, and is governed by the laws of the country where its owner is domiciled, except where, by the laws of the country where it is situated, it is subjected to the claims of the citizens of such country for satisfaction of their just demands: as to such claims a statutory assignment under a commission of bankruptcy creates no *lien*; but as to the bankrupt, all his property and choses in action throughout the world, and his power over it, is taken away and the assignee under the commission is substituted in his stead. *Per MARCY, J. and THROOP, senator.*

An assignee of a *foreign* bankrupt may sue here in a court of equity if not in a court of law in his character of assignee. *Per THROOP, senator.*

After the assignment the bankrupt holds the assigned property, subject to the title of the assignee, and becomes by operation of law the agent of the assignee. *Per THROOP, senator.*

**APPEAL** from chancery. The bill was filed on 24th September, 1828, by Charles Berners Plestoro and eight others, creditors of the appellant, and James Johnstone, an assignee under a commission of a bankruptcy sued out in England against the appellant. The bill, after stating that the parties were subjects of the king of England, domiciled in that country and setting forth the debts due to the several creditors, averred, that in the month of July, 1828, the appellant absconded to avoid being arrested at the suit of his creditors; that Plestoro, a creditor to the amount of £3500 sterling, procured a commission of bankruptcy to be issue; that on the 8th of *August* the commissioners declared the appellant a bankrupt, and on the same day executed a deed of assignment of his estate to James Johnstone, whereby the same, by the laws of England, became vested in him in trust for

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the creditors of the appellant ; that the appellant had lately arrived at the city of New-York, having brought with him on board the ship *Great Britain*, French, master, sundry merchandise, goods and chattels, to wit, 22 packages and cases of paintings, one case of medals and books and one case containing paintings and cabinet furniture, which goods it was alleged were in a public store, under the power and custody of the collector of the customs for the port of New-York. The bill further stated, that suits, had been commenced in the names of the creditors against the appellant in a court of the city of New-York for the debts due to them respectively ; that the appellant had been arrested and the suits were pending ; that the witnesses necessary to prove the debts reside in Great Britain, beyond the jurisdiction of the courts of this state. The bill prays a discovery as to the several matters alleged in the bill ; that the collector of the customs may be decreed to deliver the goods to Johnstone the assignee, upon payment of the duties, and that in the meantime an injunction issue, restraining the collector from delivering the property to the appellant, and forbidding the appellant from suing for receiving the same until the order of the court. An injunction issued according to the prayer of the bill.

In the answer of the defendant he admitted the debt of *Plestoro* and some of the others, but denied others of the debts set forth in the bill. He denied that he quitted England clandestinely ; or absconded with a view to elude his creditors ; on the contrary, he averred that he left England for the sole and only purpose of pursuing and extending his business ; that his departure and mode of travelling in England after he left London, the place of his residence, was open and public and in the way of business ; that he publicly and invariably gave out, both before leaving London and on the way, that he was coming out on a venture to the United States of America ; that he had his merchandise publicly and regularly entered at the custom-house in Liverpool, from whence he sailed bound to the city of New-York, the goods being consigned to himself at the latter port ; that he left his address for the city of New-York to such as were concerned



in knowing where he was to be found, announcing his intention, in which he was sincere, of returning to England in November then next; that he left persons in the mean time to carry on his business with a large capital for that purpose, more than sufficient to pay all his debts, and that every part of his conduct from first to last, as regarded the property in question and his adventure to this country had been fair and bona fide in the regular pursuit of his business as a merchant, with a view to better his circumstances; and that he knew and believed himself to be perfectly solvent and able to pay all his lawful debts, in case the property he left behind had not been sacrificed and his credit ruined by the proceedings of the complainants. He denied all knowledge of the suing out of the commission of bankruptcy and of the assignment under it, except what was derived from the complainants' bill; he admitted his arrival with the property in New-York and its deposit in the custom-house; and that he had been sued as stated in the bill, nine several suits having been commenced against him in the name of the complainants respectively, except Johnstone, and that, as he alleged, to oppress and ruin him and deprive him of his liberty, the suits were brought for large nominal sums, and particularly that of Ples-toro, in which \$30,000 was demanded, and the others in proportion, and that in consequence thereof he was in close custody. He insisted that the commission of bankruptcy, if issued, had issued *improvidently* and *illegally*, and ought not to prejudice him in this country; and he submitted whether he was bound to account to the complainants *jointly* on the ground of the allegations stated in the bill.

On the 7th October, 1828, the appellant, on due notice, applied to the chancellor for a dissolution of the injunction; and on the 21st of the same month the chancellor denied the motion, with costs to be paid by the appellant, and made an order accordingly. The reasons for which decisions will be found in 1 Paige's Ch. R. 236. From this order the defendant below appealed.

*D. Graham*, for appellant. The injunction should have been dissolved on the ground of the multifariousness of the

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matter contained in the bill; the mixing up of the claims of creditors and of an assignee under a commission of bankruptcy. The defendant below might have demurred, but was equally entitled to urge this objection on answer. Several distinct and unconnected parties cannot unite in a bill. Strike out the names of the creditors, as suggested by the chancellor, and the assignee stands alone; without the bankrupt he cannot sue, and yet here he sues the bankrupt, the very person whom he represents. (1 Johns. R. 118. 2 id. 345. 20 id. 259.)

The assignment is an *incipient* proceeding. The power of the assignee first appointed is limited to 42 days, when another may be substituted, and the bankrupt himself may come in at any time within 12 months and dispute the whole proceeding. (Bankrupt act of England, 6 Geo. 4, ch. 16, passed 2d May, 1825, § 92.) The question presented therefore is, whether our courts will carry into effect the bankrupt law of England and regard any proceeding under it before a final and conclusive order has been made. If not, it is of course to dissolve the injunction and to dismiss the bill. Otherwise the court are bound to adjudicate upon the act and to determine the rights of the parties under it. This, it is presumed, they will not do, as it is not in their power to see that justice shall be done; the funds of the bankrupt in England are beyond their reach, the assignee is not subject to their control, and the creditors of the appellant, not parties to the proceeding here, will not be bound by it. The bill therefore should be dismissed.

The bill discloses no equity. The statute under which the commission issued should have been pleaded, and the preliminary proceedings set forth, shewing that the commission duly issued in accordance with the statute. The assent of the creditors to the filing of the bill should have been averred. (§ 88.) The creditors having brought their suits at law, are debarred from claiming under the commission. (§ 59. 1 Rose on Bankruptcy, 184, 394. 2 id. 421. 16 East, 252.) Whatever might have been the effect of the assignment upon the property of the appellant in England, it has not the effect of operating a legal transfer of his property here. The

bankrupt law of England is in its nature and origin penal, and our courts are not bound to enforce it, or to give effect to the assignment on the assumed ground of its being equivalent to a voluntary act of a party over his own property. The rule of comity tendered to us by Great Britain on this subject has not been accepted or adopted by the courts of our country. (20 Johns. R. 229, 260, 286.) The assignee would not be entitled to an injunction under the bankrupt law, even in England; and the creditors at large had no right to ask for it. (2 Johns. Ch. R. 144. 1 Hopkins' Ch. Rep. 365.)

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*P. A. Jay*, for respondents. By the law of nations, every state is bound to do justice to the citizens or subjects of another state. By the law of England, a foreign assignee of a bankrupt is entitled to the property of the bankrupt in England, even in opposition to British subjects who have attached such property, where the attachment is subsequent to the vesting of the rights of the assignee. (1 H. Black. 691. id. 132. id. 131. 1 Douglass, 169, 4 T. R. 182. 2 H. Bl. 402. 1 East, 11. 8 Vesey, 82. 1 Rose's Bank. Cas. 462. 2 id. 99, 234, 313.) [The reader is referred to 20 Johns. R. 242 to 248, for the comments of the counsel upon the cases cited; the same counsel having, in a case there reported, quoted and commented upon the cases now cited by him.] This doctrine is fully recognized as the law of this state by Chancellor Kent, in the case of *Holmes &c. vs. Remsen, &c.* (4 Johns. Ch. R. 460.) Mr. Justice Platt, in a case between the same parties and involving the same questions, (20 Johns. R. 254,) differs in opinion with Chancellor Kent as to the rule of law which should prevail in cases of conflicting claims between foreign assignees and domestic creditors, but he unqualifiedly admits that as to the bankrupt himself, the maxim that "every man is presumed to be assenting and a party to the laws of his own country," applies, and is just and proper; the consequence of which is, that effect should be given to the assignment as being in execution of laws by which the bankrupt is bound.

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The case of *Bird v. Caritat*, (2 Johns. R. 344,) does not decide that the assignee must sue in the name of the bankrupt. It is there said the suit *may* be, not that it *must* be in the name of the assignee or of the bankrupt. Besides, here the suit is not on a chose in action, but for the recovery of goods. There the action was at law; here it is in equity, where the assignee may always sue in his own name. The assignee may sue in his own name. (3 Mass. Rep. 517. Cooper's Pl. 34.) All legally or beneficially interested may be made parties. *Cestuis que trust* may therefore be made parties. There is no case to be found which decides that because improper parties are joined, the bill must be dismissed. The bill is not *multifarious*; for though the parties are disconnected in the substratum of the action, the remedy is joint. It is like a bill by creditors whose demands are separate, calling a trustee to account. The bankrupt act is sufficiently referred to in the bill by his title. In all cases of contract, the *lex loci contractus* and *lex domicilii* of foreign debtors must of necessity be passed upon by the courts here. (2 Johns. R. 198. 3 id. 263. 7 id. 118. 11 id. 194. 14, id. 338, 346. 1 Caines, 412. 2 Cowen, 626. 4 id. 508, n.)

*D. B. Ogden*, in reply. At the time of the issuing of the commission, the goods were on the high seas. Had they been on board of a *British* vessel, it would have been so averred. In the absence of such averment, the fair conclusion is that the vessel in which they were embarked was *American*; and if so, the goods were as much within our jurisdiction as if landed in a store house at New-York. Unless, therefore, the assignment passes personal property out of the jurisdiction of England, the property in question did not pass to the assignee.

The proposition of Lord Loughborough, in 1 H. Black. 690, that personal property is governed by the law which governs the person of the owner, is denied in the broad terms in which it is advanced. It is true as to the succession or distribution of it, but not as to the collection of it. It must be collected according to the laws of the country where it happens to be.

A *voluntary* assignment is an assignment by the bankrupt himself, as contradistinguished from an assignment by act or operation of law. The case in 1 H. Black. 131, 2, was that of an assignment by the bankrupt. So in 4 Johns. Ch. R. 469, such assignment was held good. 1 H. Black. 691, puts the assignment by operation of law upon the same footing with an assignment by the bankrupt himself. The question there, however, was between the assignee and the creditors. But can an assignment be presumed to be *voluntary* when the reverse is shewn? Unless it is voluntary, it does not pass property *extra territorium*; and on the presumption that the assignment was voluntary, the property here is taken out of the hands of the appellant, and if the claim be allowed, it can only be because the British bankrupt act is in force here.

Chancellor Kent held, in 4 Johns. Ch. R. 466, that an assignment in England passed the property here. In 20 Johns. R. 254, Mr. Justice Platt (the other judges giving no opinion on the point) held the contrary. It is therefore an unsettled question in our own courts. In 5 Cranch, 289, Ch. J. Marshall says; "The bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States." It has been said of this case, that it was to be regretted that a litigated point of law of great importance should have been settled by a dry decision, unaccompanied by argument or illustration; but we have the authority of Judge Johnson, (12 Wheaton's R. 361,) for saying that the decision in Cranch, was made upon full deliberation. The cases reviewed by Mr. Justice Platt, in 20 Johnson, shew that Chancellor Kent stands upon this question in opposition to all the American judges.

A bankrupt act, it is said, though a municipal law, forms an exception to the general rule that such laws are confined in their operation to the country where they are made, because such act is a rule of international law. If so, the decisions of the supreme court of the U. S. are paramount upon this question, that court being the proper depositary of such law. If an assignment under a commission of bankruptcy in England passes property here, the bankrupt law having a retroactive operation, what would be its effect up-

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On a shipment here? would it divest the rights of a purchaser? Chancellor Kent concedes it would not, because the doctrine of relationship is a positive rule of mere municipal policy. If a part, the whole is municipal.

If the assignment passed the property, and the legal interest was vested in the assignee, why came he into a court of equity? why did he not bring his action of trover, detinue or replevin? it was not a case of lien or mortgage requiring the equitable interference of the court. And then, too, this case, where the assignee is the representative of the bankrupt as well as of the creditors, presents the anomaly of an agent suing his principal. If the bankrupt law is in force here, why apply to our courts? why not send a messenger and seize the property? Whether one shall be the representative of another depends upon our laws, and not the laws of a foreign country. Administration granted abroad will not authorize a suit here. The authority to act must be here conferred.

A rule of international law cannot be binding unless it be mutual. Great Britain has a bankrupt law, we have not; there is therefore no mutuality in giving effect here to assignments made there, when a like comity cannot be exercised in England towards us. We are unwilling to have a bankrupt law of our own; and shall we enforce the bankrupt law of a foreign nation?

The following opinions were delivered on the decision of this case:

By Mr. Justice MARCY. There are several objections to the proceedings in this cause in their nature preliminary, which lie in our way to that mainly relied on for the reversal of the chancellor's order. It is said that if the alleged proceedings against the appellant as a bankrupt vested in the provisional assignee the property in question, then the other respondents are improperly joined with him in this suit; and if it is a proceeding on the part of the creditors to obtain a discovery to aid them in their suits at law, then Johnstone, the assignee, should not have been a party. If it should be conceded that there is a misjoinder of complainants in the

bill, a motion to dissolve the injunction issued thereon is not the proper proceeding on the part of the defendant to obtain the benefit of that objection. It should have been presented to the court below by a demurrer to the bill. If it appear that any party to the bill has a right to retain the injunction, this right is not impaired because he is joined with others who have no such right.

But the right of Johnstone, the provisional assignee, to sustain this suit, is called in question. His power, it is said, is only temporary, and lasts only until the creditors make an appointment; and by the course of proceedings in bankruptcy, the creditors must have met and superseded him before this suit was commenced. The provisional assignee has as ample powers as the assignee appointed by the creditors, and he retains his trust until he is "removed at a meeting of the creditors for the choice of assignees, if they shall think fit." (6 Geo. 4th, ch. 16, § 45.) There is not the slightest intimation that Johnstone has been removed; we must therefore consider him invested with all the rights and authority of a duly constituted assignee. The 88th section of the British bankrupt acts prohibits the bringing of suits in equity by the assignees, without the assent of the major part of the creditors. An objection founded on this section of the statute is made to the proceedings in this case, because the assent of the creditors does not appear. In *Watkins v. Fry*, (1 Merivale, 255,) it was admitted by the counsel, who raised a similar objection in that case, that the court always presume an assent where a dissent is not shewn. If this suit was subject to the regulations prescribed by that act of parliament, our courts would infer, as the English courts do, that the assignee acts with the assent of the creditors if the contrary does not appear. Another objection to the bill, or rather to the right of the complainants named in it to have the relief they ask for, is founded on its multifariousness. I think there would be no use in stopping to ascertain whether this objection exists in point of fact, because if the bill was beyond all doubt multifarious, this fact could not properly have any influence upon our decision as to the order from which this appeal is

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brought. This is also an objection that should have been presented on demurrer.

The creditors distinctly as such, without judgments, and unconnected with the assignee, have not probably a right to the injunction; but the more serious enquiry is, whether Johnstone, as assignee, either alone or in conjunction with the creditors, has this right. In pursuing this enquiry, we shall be naturally led to consider, 1. What claim or title he derives to the property stayed by the injunction in the custody of the collector of New-York? and 2. If he has any claim to it, has he a right to resort to the proceedings which have been had in this case to enforce that claim?

What is the extent of the operation of an assignment under a bankrupt law of a foreign country, and what right the assignee thereby acquires here, is a grave question, which has called forth much profound learning and able discussion from the late Chancellor Kent in the court of chancery, and Mr. Justice Platt in the supreme court. This question has also been much considered in other tribunals of our country. Some of the controverted points may now be regarded as settled and "laid up among our acknowledged rules of jurisprudence;" but this case shews that there are some things on this subject that remain to be settled.

Chancellor Kent, influenced by a spirit of liberality which he indulges to a greater degree, perhaps, than almost any other enlightened jurist, and wishing that all the commercial nations of the world might become a confederacy, recognizing and observing in relation to the transactions of the citizens and subjects of each the great principles of justice, adopted in the case of *Holmes v. Remsen*, (4 Johns. Ch. R. 460.) not only the doctrine that the succession to and distribution of personal property is regulated by the owner's domicil, and not by the *lex loci rei sitæ*, but he also laid down what, I believe, was then a novelty here, the rule that our courts were called on in the spirit of comity to give, as the English courts profess to do, effect to the title of a foreign assignee, to the prejudice of rights acquired by our own citizens under our own laws, to the property and debts of the bankrupt in this country, provided the foreign assignment, in point of time,



preceded the attachment or lien acquired here. This doctrine gives to the proceedings under foreign bankrupt laws an operation *extra territorium*, and transfers, by virtue of the assignment, all the property and all the *choses in action* of the bankrupt in whatever country they are. By this decision, mere municipal regulations, (for such undoubtedly is the character of acts relative to insolvents and bankrupts,) are undisguisedly turned into international laws. Judge Platt, in a suit between the same parties in the supreme court, (20 Johns. R. 227,) comparatively confined within very narrow limits the operation of assignments under a foreign commission of bankruptcy. He denies the existence of any international law on the subject; he admits, however, that there is a comity, which is always to be exercised with a just regard to the rights that our citizens have acquired under our laws to the property of a foreign bankrupt situated in this country, and to the choses in action due to him here. The associates of the learned judge forbore to express their concurrence in this view of that case. If, therefore, we were not to look beyond the decisions of our own state tribunals, there would seem to be a serious conflict of opinion for us to settle.

The highest courts in several of the states distinguished for their enlightened jurisprudence have entertained views similar to those of Judge Platt. In Massachusetts, (13 Mass. R. 146,) in Connecticut, (Kirby's R. 313,) in Pennsylvania, (6 Binney, 353,) in Maryland, (1 Harris & McHenry, 236,) in North and South Carolina, (2 Hayward, 24, Const. R. 283,) the extra-territorial operation of statutory assignments has been denied. If more was wanting to incline the balance against the opinion of the late chancellor, enough is found in two decisions of the supreme court of the U. States, one before and the other since the cases of *Holmes v. Remsen* were discussed and decided here. In the case of *Harrison v. Sterry*, 5 Cranch, 298,) Ch. J. Marshall says: "The bankrupt law of a foreign country is incapable of operating a transfer of property in the United States." That court reiterated the same doctrine in the case of *Ogden v. Saunders*, (12 Wheaton, 213.) However satisfied the late chancellor might have been with his own views on this subject, and how-

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ever firmly he believed his positions to be established, he has subsequently acknowledged that they are swept away by this strong current of authority. Speaking with reference to the decision of the case in chancery of *Holmes v. Remsen*, he says, that "Whatever consideration might otherwise have been due to the opinion in that case, and to the reasons and decisions on which it rested, the weight of American authority is decidedly the other way; and it may now be considered a part of the settled jurisprudence of this country, that a prior assignment in bankruptcy under a foreign law will not be permitted to prevail against a subsequent attachment by an American creditor of the bankrupt's effects found here, and our courts will not subject our citizens to the inconvenience of seeking their dividends abroad when they have the means to satisfy them under their own control. (2 Kent's Comm. 330, 1.)

Although the bankrupt law of Great Britain as a law can have no operation here, it is not a legitimate inference from this proposition, that no rights derived from the operation of that law can be regarded in this country or enforced by its tribunals. It is very correctly said, by one of the judges who gave an opinion in the case referred to in Binney's reports, "that an assignment by law has no legal operation out of the country of the law maker; but by the courtesy of nations, founded on principles of mutual convenience, the laws of one country are sometimes regarded in another." Platt, J. thinks the convenient rule would be, "that statutory assignments *as to creditors*, should operate *infra territorium* only;" he admits the existence of a comity among nations, and agrees with Chancellor Kent that it ought to be observed *quatenus sine prejudicio indulgentium fieri potest*. I do not discover that this comity has any where been so far withheld as to refuse to foreign assignees a resort to our courts in their character as assignees, or representatives of the bankrupt to secure the rights they have acquired by the assignment; on the contrary, suits in their own names have, in repeated instances, been sustained and their right to sustain them established by express adjudication. In the case of *Bird and others v. Pierpoint*, (1 Johns. R. 118,) Thompson,

J., says that, "perhaps we ought not so far to take notice of foreign bankruptcies as to compel prosecutions to be carried on here in the name of the assignees, yet I think we ought to recognize the right of the assignees so as to allow them to prosecute in their own name if they pleased." Livingston, J. in giving his opinion in that case, advocated a doctrine nearly as broad as the English rule, but thought himself restricted in his application of it by the decision of the case of *Van Raugh v. Van Arsdaln*, (3 Caines, 154.) Kent, as chief justice, gave the opinion of the court in the case of *Bird and others v. Caritat*, (2 Johns. R. 342,) and he there expressly declares, "that there can be no doubt of the right of the assignees under a commission of bankruptcy, (sued out in England,) to collect the debts due to the bankrupt, either by suit directly in their own names or as trustees using the name of the bankrupt." "It is a principle," he further says, "of general practice among nations to admit and give effect to the title of foreign assignees." Ch. J. Parsons, who on other occasions firmly resisted the introduction of the English rule, remarks in the case of *Goodwin v. Jones*, (3 Mass. R. 517,) that it is admitted "that the assignee of a bankrupt, duly appointed pursuant to the laws where the bankrupt dwells, may maintain an action in that character in another state, the laws of which are not repugnant to his recovery." In the case of *Milne v. Moreton*, (6 Bin. 353,) Yeates, J., who was perhaps more strenuous and bold in denouncing the British doctrine than Ch. J. Parsons, also admits that the American as well as the British decisions assert that the assignees under a foreign commission of bankruptcy are considered the substitutes of the bankrupt, and may support suits in their own names. He adds, that "as between the bankrupt and his debtor this operation is fair, provided the debtor is made safe in his payment; but where it is extended further and thereby affects the rights of strangers, it assumes a different character." In another part of this learned opinion he says, "it is one thing to assert that assignees of bankrupts under foreign institutions should be allowed by the courtesy of nations to support suits as representatives of

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such bankrupts for debts due to them, and it is another thing to give efficacy to those institutions to cut out attaching creditors, although posterior in point of time, who have commenced their proceedings under the known laws of the government to which they owe allegiance and from which they are entitled to protection." More cases need not be cited nor better authority adduced to shew that assignees of foreign bankrupts have the right to sue in our courts in their own names. This is not even questioned by many of those who are strenuous in denying all extra territorial operation to foreign bankrupt laws. The right of such assignees to sue does not result from the law directly, but from a long used and well established comity.

But the establishment of this right in the assignee in this case amounts to nothing, if the proceedings against Abraham as a bankrupt have not effected a transfer of the property in question and given the assignee some dominion or right of dominion over it. It is confidently urged by the appellant, that no transfer is effected or rights acquired by the assignee, because the proceedings are the result of a mere municipal law, confined in its influence to the territories of the British government. It must be borne in mind that all the parties to this suit are not only British subjects, but were domiciliated in England when it was commenced. It is admitted on all sides, that personal property is, in some sense, without locality, and is sometimes affected and disposed of by the law of the owner's *domicil*. The proposition is indisputable, that such property follows the owner, and at his decease is to be distributed according to the law of the country in which he was domiciled at the time of his death, after satisfying the claims on it arising under the laws of the country where it is situated. In the case before referred to, (2 Johns. R. 342.) the supreme court of this state decided, that "the general disposition of personal property by the owner in one country will affect it every where, because, in respect to the owner's control over it, personal property has no locality." Ch. J. Tilghman, in giving his opinion in the case before cited from Binney's reports, admits the proposition, (but not to its utmost extent and without some exceptions) "that per-

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sonal property has no locality, but is transferred according to the law of the country where the owner is domiciled." The government where it is situated can subject it to regulations and give its citizens claims upon it to satisfy their demands against the owner. When the laws operate on it for any specific objects, it then has, for the purpose of answering those subjects, a locality where it is situated ; but when this is not the case, it is without locality and is subject to the laws of the county where its owner is domiciled. The property in question having no locality for any of the purposes above mentioned, or for others not mentioned, must be considered as following the person of Abraham, the owner ; and if the proceedings under the commission affected him, I can perceive no reason why it did not his property. I again avail myself of a quotation from the very learned and able opinion of Judge Platt, in the case of *Holmes v. Remsen*, to confirm the conclusion to which I have arrived or rather which I have adopted " I admit," says he, " that *between the bankrupt and his assignee and English creditors they are all bound by the law of their own country* ; and although I deny the effect of a statutory assignment to create a *lien* here so as to deprive American creditors of their remedy by attachment under our laws, yet it seems to me that the bankrupt, by the law of his domicil, was incapacitated to make any assignment after the act of bankruptcy for which the commission issued ; *as to him, all his property and choses in action throughout the world, and his power over it was taken away and the assignee under the commission substituted in his stead.*" If there is any soundness in these views, the commission against Abraham and the assignment by the commissioners divested him of the property in question and transferred it to Johnstone, the assignee.

Another view of this case arising out of the peculiar situation of the property in question, when the commission issued may be taken, which may be satisfactory to those who cannot acquiesce in the forgoing conclusion. Hitherto I have considered the property as in this country when the commission issued. Such, however, was not the fact.

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It is a self evident proposition that the municipal laws of a country, unless restricted by their terms or nature, operate to the utmost extent of the jurisdiction of that country. Each nation has a concurrent jurisdiction upon the ocean; the municipal laws of England in relation to the subjects of that country, and the property of those subjects afloat upon the ocean, must be adjudged, I think, to have the same effect as if both were within its territorial limits. This position is warranted by the decision of the supreme court of the United States in the case of *Hudson v. Guestier*, (6 Cranch, 281,) where a seizure on the ocean beyond the territorial jurisdiction of France, for the breach of a municipal regulation was declared to be legal.

The commission of bankruptcy against Abraham was issued on the 8th of August, and the property did not arrive here until the first of September. About the time he left England with the property in question, probably a few days after, in a ship, the national character of which is not disclosed, while a subject of and domiciled in that country, and many days before he arrived here, he was declared, in due form of law, a bankrupt, and all his effects assigned to one of the respondents. When the commission issued the property was within the jurisdiction of the British government, but not where that jurisdiction is absolute and exclusive: the bankrupt fleeing, as it is alleged, from his own country, had not then found a refuge in any other, nor had his property found a protection from the pursuit of his fellow subjects by being placed where the laws of their own country were counteracted or overruled by those of another government. This view of the subject would seem to clear the case from all doubt, if any remained, as to the actual transfer of the property upon which the injunction rests.

But it is said that if we recognize the right of the assignee to sue in our courts, we must entertain all questions which may arise under the British bankrupt law; and in that case our courts will become subsidiary to the lord chancellor of England, sitting in bankruptcy; that we must look to the incipient steps of the proceedings, and pass on their correctness, and must annul or reverse them as we shall find them

irregular or erroneous. Such, I apprehend will not be the necessary consequence of permitting the assignees to resort to our courts for the assertion of their rights.

Our courts are at all times open to the subjects of every other government, and I never yet heard it urged that we ought to close them to such suitors because our judges may be called on to consider the laws of other countries. If the rights of a foreign assignee, by voluntary assignment, may be enforced in our tribunals, and every day's practice shows not only that they can be, but that they are, I do not see why claims may not be prosecuted in them arising from a statutory assignment. Indeed, our own supreme court, (2 Johns. Rep. 342, as well as that of Massachusetts, (3 Mass. Rep. 517,) have regarded these statutory assignments as the voluntary acts of the bankrupts, and given to them the same effect in transferring property as assignments voluntary in fact. The correctness of this position to its fullest extent has been questioned, and I have no doubt properly: but there can be no objection to it in principle, where all the parties are subjects of the power which authorized the assignment, and their rights arise on contracts made within the jurisdiction of their own government. What was said by lord Ellenborough in the case of *Potter v. Brown*, (5 East, 129,) is equally true when applied to the judicial proceedings of this country, and illustrates several of the views which have been taken in this case, but more particularly that now under consideration. "We always import," he says, "together with their persons, the existing relations of foreigners as between themselves, according to the laws of their respective countries, except where those laws clash with the rights of our own subjects, and one or the other of the laws must necessarily give way; in which case our own are entitled to preference." The application of the *lex loci contractus* brings under the consideration of our courts every day the proceedings of the bankrupt laws of other countries and the insolvent laws of our sister states. This is so common and familiar that I need not stop to refer to authorities to establish it. Faith will be given to the duly authenticated proceedings of their own government in relation to these foreigners.

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If the commission, as is alleged, was improvidently issued against the appellant, or the proceedings have been in any respect irregularly conducted, the course for him to take, as was very properly suggested by the chancellor, is to apply to the proper tribunal of his own country for correction or redress.

It is further urged that there is no equity in the bill, or if there is any, it has been fully answered. It is well settled, that creditors at large or before judgment are not entitled to an injunction to restrain the debtor in the free use or disposition of his property. (2 Johns. Ch. R. 144.) The creditors in this case, merely as such, not having judgments against Abraham, cannot set up a right to retain this injunction, but the assignee may; for though the absconding as charged in the bill, is denied, as well as the fact of insolvency, yet the proceedings under the bankrupt act, and the actual assignment to Johnstone, one of the respondents, are not denied. It is said the assignee has no more than an unestablished claim to the property, and, as our courts are open to him, he must resort to them, as our own citizens would be required to do, to establish it; and until he has done so, he cannot have an injunction. I have endeavored to shew that the assignee in this case has not merely a claim to the property, but by the assignment it is transferred to him, and the possession of Abraham as against him is illegal. His rights in relation to it are even more perfect than those of a judgment creditor; he has a clear vested right, and in such a case there can be no doubt that the chancellor may enjoin the wrongful possessor, and prevent a sale by him. I am therefore of opinion that the chancellor properly refused to grant the motion for dissolving the injunction.

The decision of the second point raised by the appellant that costs ought not to have been granted by the chancellor, seems to be involved in the first. The costs of motions of this kind are at the discretion of the chancellor, and if he properly refused the motion to dissolve the injunction, we cannot say that he improperly charged the party making it with the costs.

I am in favor of affirming the order of the chancellor.



Mr. Justice SUTHERLAND concurred in the opinion pronounced by Mr. Justice MARCY.

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By Mr. Senator S. ALLEN. It is admitted by the chancellor, in the opinion pronounced by him in this case, that it is doubtful whether the decision of Chancellor Kent in the case of *Holmes v. Remsen* can be sustained, as it was strongly questioned and ably opposed by Judge Platt, and is in opposition to the decisions of the state courts in Connecticut, Massachusetts, Pennsylvania, Maryland and both the Carolinas ; but, in his opinion, this case steers clear of all the cases alluded to, as the contest in those cases was between foreign assignees and domestic creditors, while in the present instance the controversy is between the bankrupt and his assignee, both foreigners and subjects of the same government.

It appears to me, however, that the difference in the cases cannot alter the main and leading principle which must control on this subject, and which, I apprehend, applies as well to the cases alluded to by the chancellor as to the present case, which is, whether a foreign creditor shall possess and may exercise a power over his debtor in this country not allowed to our own citizens ? or, in other words, shall a foreign creditor be permitted to seize upon the property of his debtor without a judgment obtained in the due course of law, while such privilege is withheld from our own citizens ?

In the case of *Wiggins v. Armstrong*, (2 Johns. Ch. R. 144,) it was held that a creditor before judgment is not entitled to the interference of the court by injunction ; and there appear to be numerous cases reported to the same effect. If, then, we award to foreigners the same latitude of proceeding under our laws that we allow to our own citizens, it is all that can be required at our hands, and all that the most liberal rule of comity between nations can demand.

It was urged by the counsel for the respondents, that inasmuch as Great Britain permits assignees under a foreign commission of bankruptcy to take the property of the bankrupt in England, the same rule ought to operate here. If a general bankrupt law existed in this country, there would be some force in the remark, as in that case there would be a

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reciprocity of benefit ; but, under present circumstances, the advantage is all on the side of the British subject, and therefore unequal.

The creditors of the bankrupt having elected, under the commission of bankruptcy, not to proceed against their debtor by action or suit, in accordance with the 59th section of the British bankrupt law, can have no effect, in my view, to debar them from proceeding by suits at law in this state, as this provision of the act can only operate as a bar to such proceedings in the dominions of Great Britain ; and so the respondents have viewed it ; for it appears they have commenced proceedings in the superior court of the city of New-York for the recovery of their claims. Having done so, I am for leaving them to pursue their remedy by a due course of law, and am of opinion that the order of the chancellor refusing to dissolve the injunction issued in this case ought to be reversed.

By Mr. Senator MAYNARD. There is no allegation or proof of the national character of the ship *Great Britain*, on board of which the property of the appellant involved in this controversy was at the time of the provisional assignment under the commission of bankruptcy. As that is a material circumstance, it may be fairly inferred that if it was a British ship it would have been so averred. In the absence of such averment, it cannot be asked by the respondent that the court should make a presumption in his favor. He is bound to establish his case by the necessary averments. The question is then distinctly presented, whether a provisional assignment, under the bankrupt act of Great Britain, transfers the property of the imputed bankrupt *in this country* ; for here the property is found at the issuing of the injunction, and there is no allegation that it was within the jurisdiction of England at the time of the assignment. The presumption is as fair that it was on board an American ship, as that it was on board of a British ship ; and if so, it was, at the date of the assignment, within the jurisdiction of this country.

The principle on which the decisions seem to have been made, which give to a final assignment under a bankrupt act

the effect to transfer the property of a bankrupt in foreign countries, is, that it is a *voluntary assignment*, made *upon good consideration*. The consideration to the bankrupt is, that upon giving up all his property, he is entitled to a discharge from a greater amount of debt. It is a *voluntary assignment*, because submission to the laws is implied from every individual, when the tribunals of his country have pronounced a *final decision* in a matter in which he is interested. When the proceedings in a case of bankruptcy are completed, submission may be inferred, and the final assignment is voluntary as well as made upon good consideration. But no decision asserts the principle that the assignment transfers the property of the bankrupt by *the force of the law*. The principle of voluntary submission and good consideration cannot be implied in the case of a *provisional assignment*, after which the bankrupt is allowed time to resist the proceedings and supersede the commission; and more especially where the alleged bankrupt does in fact resist and denies the legality and correctness of those proceedings. The cases therefore in which it has been held that an assignment did transfer the property of a bankrupt in a foreign country, appear to me not applicable to the case now under consideration.

But is it the law, that an assignment does transfer the property of a foreign bankrupt in this country? Without a particular consideration of the decisions in the state courts, it may be safely asserted that they have not been harmonious on this subject, either in their reasoning or results. The law therefore has not been uniformly or definitively settled. The supreme court of the United States have decided, (5 Cranch, 202, 12 Wheaton, 361,) that an assignment under a foreign bankrupt act, is incapable of effecting a transfer of the property of the bankrupt in this country. That court is the peculiar depositary of international law. Its decisions upon questions affecting the comity of nations are entitled to the force of authority. It may be presumed, that that court have taken the most enlarged and comprehensive views of the subject, and that the principles it has adopted are the safest for the interests of this country. If we decide in con-

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formity with the decisions of that high tribunal, uniformity will be produced, a result certainly desirable upon a great subject of international law. But if we decide differently, the strange and inconvenient anomaly will be produced, that the law of this state, without any peculiar reason, will be different from the law of the whole Union.

But if the assignment in this case did operate a transfer of the property in question, what need is there of the aid of a court of chancery to enable the assignee to obtain possession of it? If by virtue of the assignment, the assignee acquired a *legal title* to the property, the courts of law are abundantly competent to afford the required relief.

These views, without examination of the minor points, lead me to the conclusion that the order of his honor the chancellor ought to be reversed.

By Mr. Senator OLIVER. Johnstone, one of the complainants below, is an assignee under a foreign commission of bankruptcy, asking the aid of the court of chancery of this state to enforce his claims to property *in this country* in the constructive possession of the bankrupt, the title to which is alleged to have passed to him by the deed of assignment.

As against the *creditors* of the bankrupt in this country, I am inclined to think that it may be considered as settled law that the assignment would not operate to transfer the property, so as to defeat such creditors in any proceedings they might commence under our laws against the property itself for the recovery of debts due to them. This is admitted by the chancellor, in the opinion delivered by him, which we are now reviewing; but he supposes that a principle ought to prevail in the determination of the rights of the parties, where the contest is between *the assignee and the bankrupt*, different from what would govern where the question arises between a *foreign assignee and domestic creditors*. To this doctrine I cannot subscribe, though I admit the question is not free from difficulty and embarrassment; for while on the one hand, I feel the full force of the obligation which every well regulated government is under to compel justice

to be done between man and man, without regard to country or clime, and to give every facility to foreigners which is afforded to its own citizens, by throwing open the doors of the temple of justice for the prosecution of claims, and for compelling dishonest and fraudulent debtors to satisfy the just and honest claims of their creditors; on the other, I cannot consent to become auxiliary to enforcing a bankrupt law of a foreign nation against one of its citizens or subjects.

The question is not whether a foreign assignee shall be permitted to sue in our courts; in relation to that there can be but one opinion. Had the proceedings in bankruptcy in this case been perfected, the bankrupt acquiescing in their justice and propriety, and the assignee substituted in his place, and a question had arisen between him and a debtor of the estate, no one would have doubted or questioned the right of the assignee to sue in our courts; but that is not the case we are considering. The question here is, whether the comity of nations, or, in other words, the enlightened and liberal principles of jurisprudence, require that we shall enforce the bankrupt law of a foreign nation, by giving effect to a statutory assignment, not merely by allowing the assignee to sue in our courts when the validity and legality of the assignment is not disputed, but by enforcing the harsh, rigorous and penal provisions of a bankrupt law *against the bankrupt himself*, who denies that he is insolvent, and insists that if a commission of bankruptcy has issued against him, (of which he professes his total ignorance,) it has issued improvidently and illegally. I question whether a similar case can be found in the books, and I much doubt whether the English courts, notwithstanding all the liberality exhibited by them in giving effect to foreign statutory assignments, ever have or ever will consent to execute a foreign bankrupt act against the bankrupt himself. To my mind, there seems a manifest impropriety in so doing, and that the grossest injustice might flow from it, especially in a case like the present, where the proceedings are only incipient, and may be set aside by the bankrupt coming in and disputing them, he being allowed to do so, at any time within

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twelve months after the issuing of the commission. (§ 92 of the *Bankrupt Law of England*.) Our courts cannot protect the bankrupt against injustice, nor, after having stripped him of his property, can they give him the benefits provided by the act under which the proceedings are had against him. They cannot even shield him from oppression, nor prevent his creditors from incarcerating him in a prison at the very time they are attempting to enforce the bankrupt act against him. The appellant is now in close custody at the suit of the very creditors who sued out the commission, and though it is suggested by the chancellor that he might perhaps be discharged on common bail, I question the power of a court here to grant such discharge; for to authorize them to do so, they would have to look into the provisions of a bankrupt act of a foreign state, and could determine the rights of the parties only by issuing to construe its provisions and enforcing them according to the intent of the makers of the act, which I presume they would not, and acting advisedly could not do.

On the whole, I subscribe to the opinion of Ch. J. Marshall, in 5 Cranch, 289, that "the bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States," and I fully concur in the reasoning of Mr. Justice Platt, in the case of *Holmes v. Remsen*. (20 Johns. R. 260, 261,) where commenting upon the opinion of Chancellor Kent, in which he advanced the proposition "that our courts are bound to give effect to a foreign assignment, because it is equivalent to a voluntary act of the party over his own property, every man's assent being presumed to a statute," observes that it might with equal justice be said, that if an *Englishman* commits an act of *treason*, the consequent forfeiture of his estate shall be deemed equivalent *here* to his own voluntary transfer, as that an assignment under the bankrupt law shall be considered as the party's own act. In the one case the assignment is in execution of laws by which he was bound, and he has voluntarily committed the act authorizing the making of it; in the other he spontaneously does the act which, according to the laws of his coun-

try, worked the forfeiture. Surely our courts would not enforce such forfeiture, although the right of the government in the one case would be as perfect as the right of the assignee in the other. In either case if the party escapes beyond the reach of the penal laws of his own country, he is freed from their operation; and though in the case of the *bankrupt*, let him go where he will in the civilized world, he cannot escape his creditors, and will be required to answer to them, he cannot be subjected to a *forfeiture* of his goods in consequence of the enactment of laws which have no effect beyond the territories subject to such laws. The obligation of a *contract* is universal, and may be enforced wherever the contracting party may be found. Not so a municipal law, which no country other than that which enacted it is bound to enforce. Had the parties and the property remained within the jurisdiction of the country where the laws were in operation under which the assignment was made, the remedies given by that law might have been enforced, and the act carried into perfect and complete execution. Had the assignee succeeded in reducing the property to his own possession and control whilst within the jurisdiction of England, his title having been thus consummated, might have been enforced here; but the party to be affected by the law having passed into the territories of another state, where that law cannot be known and acknowledged as of binding efficacy, it is as a dead letter for every purpose which it has failed to accomplish. What it has laid its hands upon it will hold, but it can make no further acquisitions. The result is, in my opinion, that the parties are *remitted* to their original characters of debtor and creditor, in which they will be recognized by our laws, and every facility given to the latter to enforce his claims against the former, which is given to our own citizens to enforce their claims against their debtors; but no remedy can be awarded to the foreign assignee which would be denied to our own citizens. An injunction would not be allowed to a citizen here, claiming to be the owner of personal property in the hands of a third person before judgment, nor ought it to be allowed to a foreign assignee.

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There is one other view of this question which to my mind produces the same conclusion as it respects the present appeal. The utmost latitude that has been claimed as to the force and effect of a *statutory assignment* is, that it shall be considered equivalent to a *voluntary act* of the party over his own property. If so, what would be the effect of a voluntary conveyance, where the vendor refuses to deliver the property to the vendee? Could the vendee claim the property and take it out of the possession of the vendor by any process of law, if he refused to deliver it? or would he be driven to his action, either of *assumpsit* for the recovery of damages for the non-performance of the contract, or of *trover* for the non-delivery, or of *detinue* for the detention? Undenially one or the other of these remedies only could be resorted to; and should he apply to chancery to prevent the vendor from using or disposing of the property, he would be told that his remedy at law was perfect, and that the court could not aid him. So in this case, if the assignment under the commission of bankruptcy be considered equivalent to the act of the party, all that the assignee can do is to demand the property, and on refusal, bring his action of trover. Surely no greater effect will be given by our courts to this assignment than if it was the voluntary act of the party; in which case, if after making a contract the vendor prefers to retain the property, there is no principle of law which can compel him to yield it up, or to restrain him in the use or disposition of it. All that can be asked, are damages for the non-performance. Admitting therefore what cannot even be pretended in this case, that the proceedings had been perfected, that the time for the bankrupt to apply to set them aside had expired, that the adjudication of bankruptcy had become final and conclusive beyond appeal or reversal, and that in adjudicating upon the question, the same force and effect should be given to the statutory assignment as to a voluntary conveyance, the remedy of the assignee was at law, and not in equity. I am therefore of opinion that the injunction improperly issued, and that the order of the chancellor refusing to dissolve ought to be reversed.



By Mr. Senator STEBBINS. The questions presented upon this appeal are, 1. Whether the proceedings under the bankrupt act in England operated to transfer the property in question ; 2. If so, whether the assignee was entitled to the injunction ; and 3. If not, whether it ought to be retained in favor of the creditors at large.

It has been determined by the supreme court of the United States and by the state courts of Connecticut, Massachusetts, Pennsylvania, Maryland, and both the Carolinas, that an assignment under the bankrupt law of England does not operate as a legal transfer of the personal property and choses in action of the bankrupt in this country. The cases are referred to in the opinion pronounced in the court of chancery. It seems to be conceded also that such is the law in this state, notwithstanding the decision of Chancellor Kent, in *Holmes v. Remsen*, (4 Johns. Ch. R. 460,) which case appears to me to exhibit the efforts of a great mind and persevering industry to rear a beautiful structure of international law without much regard to its usefulness or the solidity of its materials. The doctrine of that case is, that by the operation of the laws of a foreign kingdom, the property and debts of a foreigner in this country are transferred beyond the reach of his American creditors, and that by the comity of nations, our own citizens are bound to look quietly on, while the English creditors withdraw and divide the effects, upon the credit of which alone perhaps their debts were contracted. Without, however, entering into an investigation of this principle, which it appears to me is fraught with consequences the most mischievous and impolitic, I deem it sufficient to refer to the able opinion of Mr. Justice Platt, in a subsequent case between the same parties, (20 Johns, R. 229,) as containing, in my judgment, a triumphant refutation of the doctrine of Chancellor Kent.

This case, however, is said not to be affected by the principle of the cases above mentioned, because *there* the contest was between foreign assignees and domestic creditors claiming under the laws of this country, and *here* it is between the assignee and the bankrupt himself, all resident in England ; and secondly, because the property itself at the time of the assign-

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ment was constructively within the jurisdiction of Great Britain.

The question is, whether the assignment wrought a change of property ? and being an assignment by operation of law, can it affect property beyond the reach of that law ? This I take to be the reason why property here is held not to pass under a foreign commission of bankruptcy : the bankrupt laws do not reach it. If this property, therefore, was without the jurisdiction of Great Britain at the time of the assignment, I perceive no materiality in the enquiry as to the residence of the parties or between whom the controversy may happen to be. Would this court enforce the lien of an English judgment upon property here, and not within the realm of England at the time of the judgment, even against the debtor, himself a British subject ? Would it enjoin the delivery of it to the agent of the sheriff there, for the purpose of enabling him to levy ? Would it against such a party enforce the forfeiture of goods for treason ? But in the case of a *voluntary* assignment or sale of property it passes, although without the jurisdiction of the government where the parties are domiciled, because the obligation of contracts is acknowledged every where, and in respect to the control of the *owner* over personal property it has no locality ; but in respect to the control which the *law* can exercise over it, locality is every thing. Much of the difficulty upon this point arises I apprehend from the loose remark in several of the cases, that an assignment under the bankrupt law is equivalent to a *voluntary* assignment ; a remark which, without some exceptions, appears to me unwarrantable.

Is it true then that this property was constructively within the jurisdiction of Great Britain at the time of the assignment ? It was on the high seas on its way to this country, consigned to the appellant, a British subject, who was on board the same ship ; but whether the vessel was British or American does not appear. If it is conceded, and I think it cannot be denied, that the assignment under the commission would pass the property within the jurisdiction of England, but not that within the jurisdiction of this country, it appears to me the complainant, the assignee, should have shewn that

the property was within the jurisdiction of that country in order to establish his title to it under the assignment.

Upon this branch of the case the enquiry is very material whether it was laden on board a British or American vessel; for I cannot admit that *British* merchandise, although in the actual possession of a *British* subject, on board of an *American* vessel on the high seas is still within the jurisdiction of that country. Whatever may be the British doctrine upon that subject, ours seems to me to be too deeply rooted in the policy of the government to be shaken at this day. From the organization of our government the American doctrine has been, that the flag covers the merchandise and that American ships make American goods. We claim exclusive jurisdiction over American ships floating under the protection of the American flag, whatever may be the national character of the property it covers; and most of the collisions which we have experienced with other nations have been in defence of this right against claims by belligerents to the right of search and seizure of enemy's property. The steady effort of the government has been to engraft this principle into the law of nations, and it will be found recognized in our treaty with Colombia, and if I mistake not, in treaties with other powers. I hold, therefore, that if this property was laden on board an American vessel and on the high seas at the time of the assignment, it was within the jurisdiction of the United States, and could no more pass by that assignment than if lodged where it now is, in the custom-house at New-York; and that if laden on board of a British vessel, that fact should have been averred by the assignee as essential to his title. The conclusion that follows is, that the assignee has not shewn a title to the property to enable him to retain the injunction.

But if the assignee had title to the property, was he entitled to the injunction issued in this cause? The injunction issued to restrain the collector from delivering the property to Abraham, and to restrain Abraham from receiving or prosecuting for it on the ground alleged in the bill, that it belonged to the assignee in virtue of the assignment. Why not resort to the remedy at law by an action of trover or detinue?

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The next question is, whether the creditors who are joined with the assignee as complainants are entitled to retain this injunction? They are all creditors at large, having no lien by judgment, and I apprehend, therefore, are not entitled to the extraordinary interposition of the court by injunction. The cases of *Wiggins and others v. Armstrong*, (2 Johns. Ch. R. 144,) and *Moran v. Dawes*, (1 Hopk. Ch. R. 365,) are both strong cases upon this point. In the latter, it was determined that a plaintiff, even after a verdict in his favor, was not entitled to an injunction to restrain the defendant from alienating his property, where the declared object of advertising it for sale was to defeat the collection of the judgment. The former case sustains the same principle.

In my opinion, neither the assignee nor the creditors of the appellant were entitled to the injunction issued in this cause, and the order of the court of chancery denying the motion to dissolve it ought therefore to be reversed.

By Mr. Senator THROOP. Various exceptions have been taken to the form of the bill in this case, which, it appears to me, it is not material to discuss or decide, as they do not involve the main question which arises upon this appeal. Besides, they can be obviated by amendments in the court below.

It may well be doubted if the divers interests of creditors at large can be united in one bill praying for common relief, there being no community of interest in their several claims. They also set up the rights of the assignee, which are inconsistent with the claims of the creditors themselves, and the creditors will not be allowed, if Johnstone is entitled to the possession of this property under his title derived through the proceedings in bankruptcy set up in this bill, to take from Abraham, by the same proceeding, all means of payment, and at the same time compel him to pay or be adjudged to pay their debts. But they ask no such thing; they unite with the assignee, in the prayer of the bill, that the property in controversy may be delivered to Johnstone under his rights and in his character of assignee, and in the mean time that Jonathan Thompson, the custom house officer, be prohibited from delivering it up to Abraham.

The bill is sufficient to raise the questions, did Johnstone, the assignee, acquire the right of property in these goods? and can he proceed in chancery in his own name to recover the possession of them?

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Upon the argument the counsel for the appellant went into an examination of the bankrupt laws of England; but in the view which I take of this case, I cannot perceive how this court or the court of chancery is called upon. in the remedy here sought to be obtained, to execute the bankrupt laws of England, or are sought to be made ancillary to their commissioners in bankruptcy. The bill alleges that upon the absconding of Abraham, proceedings in bankruptcy were commenced against him, and he was in due form declared and adjudged a bankrupt; that according to the laws of England, the deed of assignment divested the bankrupt of his property in the goods in question, and the title was transferred to Johnstone, the assignee, who is one of the complainants. Such is the effect of those proceedings; it is a transfer of title by operation of law. Are those allegations denied? If not, the title of Johnstone against the bankrupt is perfect, and it can make no difference, in respect to the right of property, whether this transfer of title was by force of the bankrupt laws of England, or under their laws in relation to judgments and executions, or to voluntary transfers by the party himself.

As to these material allegations, upon which the question of title in this case depends, the answer is, in effect, silent. The appellant denies that he absconded with a view to elude his creditors, but he neither admits or denies the issuing of the commission of bankruptcy against him, nor the adjudication of the commissioners that he was a bankrupt, nor the deed of assignment; in effect, for all the purposes of the motion to dissolve the injunction, he says nothing in answer to these allegations of the bill. His denial of absconding might be material if the proceedings were in a forum acting under the English laws of bankruptcy; but upon this motion in our own courts, where the question is the right of property, the adjudication of the English tribunal is to be considered conclusive against him as to the fact of bankruptcy. If, upon this question of continuing the injunction, the chancellor had un-

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dertaken to reverse the adjudication of the English tribunal upon the strength of the denial of the appellant that he had committed the act of bankruptcy adjudged against him in that country, he would have been acting as a court of appeal, and it would then have been more readily perceived that the high judicial tribunal of a sovereign and independent government had become ancillary to the commissioners of bankruptcy in England, and had undertaken to execute the bankrupt laws of that country, while our own legislature had refused to provide such a system for their own citizens. On the contrary, he has gone no further than to consider the adjudication, uncontradicted as it is, as the judgment of a competent tribunal, and has given to the deed of assignment its legal effect upon the title to the property in question.

It is to be observed that all the parties to this controversy belong to the country under whose laws this assignment was made. The bill charges the defendant with being domiciled in England, whence he absconded. He denies the absconding, and says that he left his address for the city of New-York, announcing his intention, in which he was sincere, of returning to England in November next ensuing, having left persons in the meantime to carry on his business with a large capital. Such a temporary absence, upon a specific adventure, could not work a charge of domicil. Not only is the defendant to be considered domiciled in England, but, in my view of the case, the property was within the jurisdiction of that country at the time of the adjudication and assignment on the 8th of August. He left England in July, with a sincere and avowed intention of a speedy return, having the goods in the same ship consigned to himself on board, and he arrived in New-York in September following. The national character of the ship no where appears, a fact which, if the defendant deemed it of any importance or influence in his case, he should have shewn. It would be a forced presumption to say that this was an American vessel, so as to withdraw this property from the jurisdiction of the country of the claimants, and give it a locality in this country. If this presumption cannot legally be drawn from this case, then this property was actually within the jurisdiction of England at

the time of the assignment and under their laws Johnstone, the assignee, became the owner. But if it were not, the claimants were subjects of that country and domiciled there, and the right of personal property is to be decided by the laws of the country where the owner is domiciled. (1 East, 11. 8 Vesey, 82. 2 Rose's Bank. Cases, 99, 313.)

Independent, however, of this inquiry, the deed of assignment under these proceedings was evidence of the paramount title of Johnstone in the property. In *Bird et al. v. Caritat*, (2 Johns. R. 344,) Ch. J. Kent says, "it is a principle of general practice among nations to admit and give effect to the title of foreign assignees. This is done on the ground that the conveyance under the bankrupt laws of the country where the owner is domiciled is equivalent to a voluntary conveyance; and the general disposition of personal property by the owner in one country will affect it every where, because in respect to the owner's control over it, personal property has no locality." "There can be no doubt of the right of the assignees to collect the debts due to the bankrupt, either by a suit directly in their own names or as trustees using the name of the bankrupt." He lays down the same general proposition, as chancellor, in *Holmes v. Remsen*, (4 Johns. Ch. R. 460,) in these words: "It is a principle of national law to take notice of and give effect to the title of foreign assignees; and the assignees of a foreign bankrupt may sue here for debts due to the bankrupt estate, either as such assignees or in the name of the bankrupt." These principles apply to a cause like the present, (where the subject matter is not a chose in action, but a bale of goods,) brought by the assignee against his bankrupt, both being subjects of England at the time of the assignment. And the opinion delivered by Platt, J. in *Holmes v. Remsen*, (20 Johns. R. 267,) does not affect their authority. They are recognized as law by the English courts, and the rights of foreign assignees are enforced in that country. (1 H. Black. R. 691, 131, 132. 1 Doug. 169. 4 T. R. 182.)

When this principle of international law is applied to this case, can there be any doubt of the right of the assignee to sue in the courts of this state? The assignment under the

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bankrupt law is equivalent to a voluntary assignment by the bankrupt, inasmuch as it deprives the bankrupt of all his former title to or control over the property; which effect the courts of foreign countries admit and recognize. The bankrupt then, in effect, as to property in his possession, holds it subject to the paramount title of the assignee. By operation of law he becomes the agent of the assignee, (Cowp. 570, 7 T. R. 296,) and being found in this country with the property of his assignee in his possession or subject to his control, it would be nugatory to acknowledge Johnstone's right of property and deny him a remedy for wrongs to such property in our courts.

But it is objected that the assignee cannot sue in his own name; and it is manifest that he has no mode of compelling the bankrupt to sue himself; and hence it is said there is no remedy in the case. If, however, there be any doubt of the courts of law affording an adequate remedy in the name of the assignee, such objection does not apply to a proceeding in chancery where the rights of assignees, as in case of mortgages, &c. are recognized and prosecuted in their own names. That there is no adequate remedy at law for acknowledged rights, is one ground of the jurisdiction of that court. But in this case, the rights sought to be enforced and the wrongs sought to be remedied, are peculiarly the subjects of equity jurisdiction. The complainant, as trustee for all the creditors, is seeking to arrest the defendant in the commission of a flagrant fraud in respect to the trust property. He finds it pledged in the hands of a third person, out of the actual possession of the defendant. He seeks to continue it where it is found until the conflicting claims between him and his bankrupt or agent are judicially determined. His bill shews such a case as leaves no doubt, that if the property is restored to the possession of the defendant, he will consummate the fraud against this trustee and the creditors, which he was in the act of accomplishing when he was arrested by the injunction in this case. These circumstances might separately in some cases, afford sufficient reason for exercising the power of that court by injunction; and when united they leave no doubt in my mind of the correct exercise of that power in this case. The defendant not hav-



ing answered or denied the proceedings under which the assignee derives his title, the continuance of the injunction was of course proper, and the motion to dissolve it ought to have been denied. I am therefore for affirming the order of the chancellor.

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On the final decision of the question, Shall the order of the chancellor refusing to dissolve the injunction be affirmed or reversed? the members ranged themselves as follows:

*For affirmance*—Mr. Justice SUTHERLAND, Mr. Justice MARCY, and Senators THROOP and WOODWARD, 4.

*For reversal*—Senators S. ALLEN, BOUGHTON, HAGER, HAYDEN, HUBBARD, MATHER, MAYNARD, M'CARTY, McLEAN, McMARTIN, OLIVER, REXFORD, SMITH, STEBBINS, TODD, WARREN and WHEELER, 17.

Whereupon the decretal order of the chancellor was ordered, adjudged and decreed to be reversed.

Decretal order reversed.

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BEACH and others, *appellants*, and THE PRESIDENT, &c. of the FULTON BANK, *respondents*.

The *re-examination* of a witness in chancery rests in discretion, and though granted under peculiar circumstances, is against the ordinary practice of that court.

Where *usury* is pleaded in an answer in chancery, and the facts and circumstances constituting it specially set forth, evidence proving a usurious contract different from that alleged in the answer is inadmissible.

*Usury* is a good defence in equity as well as at law, whether put forward by way of answer or plea. If the usury be *proved*, the defendant will succeed, but if he cannot succeed without invoking the exercise of the equitable powers of the court, the aid of the court will not be granted unless he does equity. Where, therefore, an application was made to open the proofs in a cause in chancery for the purpose of *re-examining* a witness, and to *amend an answer* so as to embrace an usurious contract to which it was expected the witness would testify on his re-examination, which contract was not set forth in the answer originally put in, it was held that the defendant was not entitled to

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succeed in his applications, unless he paid or offered to pay the money actually lent, with the legal interest thereof.

*Amendments* will not be granted to enable a party to set up the defence of *usury* or of the *statute of limitations*, if he has not availed himself of the opportunity to interpose such defence in the first instance. *It seems*, however, that where such defences are *defectively* set forth, an amendment will be allowed to give the party the benefit of the defence which he *intended* to present, but he will not be permitted to put in a *new* or *additional* plea or answer.

*Trustees*, under a deed of assignment for the benefit of creditors, may set up the defence of *usury*; thought, *it seems*, they are not bound to do so.

A contract for the loan of money made with an *incorporated company*, as well as the security taken on such loan, is void, if the power to loan money is not expressly given, or necessarily incident to the powers granted to such company by its charter.

APPEAL from chancery. The respondents being the holders of a promissory note for \$15,000, made by the appellants payable to *Keeler and Rogers*, a mercantile firm in the city of New-York, and negotiated by them, filed their bill to enforce the trusts contained in certain deeds of assignment executed by Keeler and Rogers to the appellants. The appellants, for the accommodation of Keeler and Rogers, and to enable them to continue their commercial operations, on the 22d October, 1825, made and signed four promissory notes, one for \$5000, a second for \$10,000, a third for \$15,000, and a fourth for 20,000, payable twelve months after date; and to secure the appellants against loss or damage by reason of so doing, Keeler and Rogers on the same day executed to them a deed of assignment of a large amount of property *in trust* to apply the proceeds to the payment of the notes thus made by the appellants. The note for \$15,000 was negotiated by Keeler and Rogers to the Hudson Insurance Company of the city of New-York, from whom it passed to the respondents. On the 29th October, 1825, Keeler and Rogers stopped payment, and on the same day executed a further assignment to the appellants of other and further property, in trust for the payment of the said notes and of other debts of Keeler and Rogers. The bill averred that funds to a large amount had come to the hands of the appellants, that they refused to pay the respondents any part thereof and concluded by praying an account, &c.

The appellants, in their answer, admitted the trusts charged in the bill, and the receipt of funds sufficient, or nearly so, to pay and discharge the note in question, but insisted upon the benefit of the statute against usury, alleging that the note had been passed under a usurious contract by Keeler and Rogers to the Hudson Insurance Company, setting forth the contract particularly, and that the Hudson Insurance Company, after becoming possessed of the note, transferred it to the respondents.

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Proofs were taken in the cause. James Keeler, a member of the firm of Keeler and Rogers, in his testimony, supported the defence of usury as alleged in the answer. Mark Spencer, with whom, in the character of President of the Hudson Insurance Company, the negotiation respecting the loan of the money was had, on the contrary, proved it to be a legal transaction. In July, 1828, the proofs in the cause were closed.

In February, 1829, a petition was presented to the chancellor, praying that the proofs might be opened for the purpose of *re-examining Mark Spencer*. In this petition it was stated that in a suit at law tried in December, 1828, which suit was brought for the recovery of the \$5000 note, given at the same time with the note in question, Mark Spencer was examined as a witness, and that the facts to which he then testified, relating to the negotiation as well of the note in question in this suit as of the \$5000 note, proved that the contract entered into between him and Keeler in relation to the notes was usurious. The testimony of Spencer, as set forth in the petition, clearly proved the contract to have been usurious, but its terms were essentially and materially different from the usurious agreement set up in the answer of the appellants. A part of this testimony was, that Spencer, on receiving the two notes of \$15,000 and \$5000, advanced the sum of \$14,000, and that it was agreed between him and Keeler, that if a negotiation then on foot to obtain \$50,000 from the Fulton Bank on the notes of Keeler and Rogers, endorsed by the appellants, was completed, the sum so advanced by him was to be returned and the notes given up; otherwise, if that sum could not be raised, and Keeler and

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Rogers stopped payment, then the notes were to be retained as security for the \$14,000, and any other debt which Keeler and Rogers might then owe or thereafter owe to the Hudson Insurance Company. The chancellor decided against the petition, expressly on the ground that the appellants had not offered to pay the *money actually lent with legal interest*, ruling that a party who sets up the defence of usury and cannot sustain it without the aid of the court of chancery, must consent to do equity before the court will afford him any relief. In April, 1829, the appellants presented a petition to the chancellor for permission to amend their answer so as to set up the usury disclosed by the testimony of Mark Spencer, elicited on the trial of December, 1828, suggesting that otherwise they might not be able to avail themselves of the same, by reason of its not being fully set up in the answer already put in. The chancellor decided against this petition also. (For the opinions of the chancellor on both those applications, see 1 Paige's Ch. Rep. 429 and 431.) The defendants below appealed.

*S. A. Foot & A. Van Vechten*, for appellants. The power to grant a motion for the re-examination of a witness rests in sound discretion, and its exercise is governed by circumstances. (1 Johns. Ch. R. 483. 2 id. 432. 4 id. 649.) In the following analogous cases such motion prevailed: 1 Johns. Ch. R. 526; 1 id. 368; Finch's Prec. 493; Ambl. 585; 2 Vernon, 472; 1 Vesey, jun. 398; Dickens, 750; 2 P. Wms. 646; 13 Vesey, jun. 288; and in none of them did the court enquire what was the defence sought to be established by the proof. In the case cited by the chancellor where a condition was annexed to the opening of an order that a bill be taken *pro confesso*, a default had been incurred, and the party asked a favor; not so here, delay was not imputable to the appellants, and what they asked was not favor, but matter of right. Relief against usury is granted in chancery as well as against forgery, if the party can prove his case without calling for a discovery. (2 Vesey, sen. 246.) If discovery is asked, the party is bound to pay the sum lent and interest; otherwise not. (1 R. L. 66.) The rule laid down

by Chancellor Kent, in *Livingston v. Tompkins*, (4 Johns. Ch. R. 431.) that equity does not assist the recovery of a penalty or forfeiture of any thing in the nature of a forfeiture, applies only to cases where compensation can be made to the party without enforcing the penalty as in the cases collected in 1 Maddock, 37, 8. Chancellor Walworth in this case says, that if a party cannot avail himself of the defence of usury without the aid of a court of equity when he applies for equitable relief, he must consent to waive the forfeiture and pay or agree to pay the amount actually due; and that the same rule prevails when the party applies for equitable relief to a court of law, citing 1 T. R. 153. The case in Term Reports stands alone, and has never since been recognized as law. It was one of the attempts of Lord Mansfield to assume equity jurisdiction; at all events it does not relate to the subject of amendments. If the rule that the party must pay the amount actually due be correct as a general rule, it does not apply to a case like the present, where the appellants stand in the character of sureties and assignees, and were not parties to the usury nor violators of the law.

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If it is objected that the answer is not broad enough to admit the evidence, the reply is, that the decision was not made by the chancellor 'on that ground; and at all events if the evidence be material, it should be received and the pleadings may afterwards be amended so as to cover the proof. (2 Brown's Parl. Cas. 194. 4 id. 640.)

Leave to amend will be granted in *penal* actions, even after the time limited for bringing a new action. (7 T. R. 55. 1 Starkie, 400. 6 Taunton, 419. 17 Johns. R. 346.) So also in an action for *slander*. (1 Wendell, 93.) Courts of common law look into the nature of the defence only where the statute of limitations is sought to be pleaded. (1 Wendell, 302. 2 id. 294.) Where a plea was defective, though the defence was strictly and purely technical, an amendment was allowed. (6 Cowen, 606.)

The application was not for leave to plead usury, such plea had already been interposed; it was to be allowed to have the benefit of testimony not known at the time the proofs were taken.

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It could not be required that the appellants should verify the evidence of the witness; this case necessarily forming an exception to the general rule.

There was no *contingency*, as to the re-payment of the loan to take the case out of the statute; a contingency to notorious bankrupts to repay \$14,000 within a few days cannot be considered otherwise than a shift or device to evade the statute.

The note was not available in the hands of Keeler and Rogers, it had no legal existence until it was discounted; it was made for their accommodation, and could not have been enforced by them against the makers. Consequently it cannot be said that the contract with the Hudson Insurance Company was not usurious.

*J. Hoyt & D. B. Ogden*, for respondents. It is against the general practice of the court of chancery to re-examine a witness after the proofs have been closed; though it is sometimes done upon good cause shewn, under peculiar circumstances. (2 Johns. Ch. R. 432.) Courts of equity instead of relaxing, are tightening this rule. (2 Swanston, 401. 19 Vesey, 590. 5 Maddock's Ch. R. 56.)

The appellants are not entitled to re-examine the witness, not having stated under oath their belief in the facts sought to be obtained on the re-examination. This they were bound to have done, (1 P. Wms. 727; 3 id. 371; 13 Vesey, 511; 3 Atk. 35; 1 Johns. Ch. R. 49; 3 id. 395;) and still could not do, as the relation given by the witness of the contract for the loan varies from the account of the matter set forth in the answer. The appellants having attempted to impeach the witness Spencer, they should not be allowed to avail themselves of his testimony to support their defence, (2 Atk. 529,) nor be permitted to use him to impeach Keeler, their own witness.

The answer setting up usury, and the facts and circumstances constituting it being specially alleged and issue taken thereon, it is not competent to the appellants to introduce evidence of another and different state of facts to support the defence. The rules of pleading as to pleas in bar

in equity are the same as at law. (Beames, 163. 2 Chitty, 515. 1 Bos. & Pul. 144. 3 Mod. 35. Comyn's Dig. Pleader, 2, w. 23. Ord on Usury, 92. 2 Show. 329. 12 Mod. 385. 3 T. R. 538, 351. 2 Maule & Selw. 377. Cowp. 671. 3 Atk. 589. 6 Vesey, 594. 1 Ball & Beatty, 324. 6 Johns. R. 543. 14 id. 42. 1 Cowen, 734. 4 Johns. Ch. R. 332. 12 Vesey, 477. 3 Swanston, 472.)

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There was no usury in the transaction as testified to by Spencer at the trial in December, 1828; the payment of extra interest depended upon a contingency. Where the principal is to be re-paid on a contingency, and not at all events, the contract is not usurious. (1 Cowper, 112. Cro. Jac. 509. 1 Atk. 342, 450. Comyn on usury, 73, 74, 159. 3 Bos. & Pul. 154. 3 Atk. 520. 2 Rolle, 469. 5 Co. 70. 1 P. Wms. 653. Plowdon on Usury, 182. 1 Hawkins P. C. ch. 8, § 19. Cooper, 204. 1 Johns. Ch. R. 367, 439. 1 Peters' U. S. R. 232.) Besides the note was available in the hands of Keeler and Rogers, and might have been enforced against the appellants who had received a full consideration for it. (15 Johns. R. 55.)

The appellants being trustees with funds in hand are bound to pay over the same, according to the terms of the deed of trust, and it is not competent to them to set up the defence of usury; nor is it in the power of the assignors to recall the trust or destroy rights vested under the assignment. (1 Bos. & Pul. 3, 295. 2 Wilson, 309. 2 Burr. 2069. 10 Wheaton, 393. 1 Johns. C. 158.)

A court of appeal will not interfere to regulate the practice or discretion of an inferior court, except in *extreme* cases. (1 Peters' U. S. R. 168.) This is not such a case. The application was addressed to the discretion, to the favor of the court. At law, judges enforce the statute with regret against *bona fide* holders of paper tainted with usury; in equity, in the exercise of a sound discretion, an application of this kind therefore may well be refused. The legislature in their late revision of the laws, (1 R. S. 772, § 5,) exempt *bona fide* holders of negotiable paper from the operation of the statute, and virtually say it is inequitable and unconscion-

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able to enforce the statute against them ; and will not a court of equity say so, when it is in their power to protect parties against such a defence ?

The following opinions were pronounced :

By Chief Justice SAVAGE. 1. As to the ordinary practice of the court upon a motion for the *re-examination* of a witness, several cases are found both in our own and in the English Books. In the case of *The Trustees of Kingston v. Tappen*, (1 Johns. Ch. R. 368,) a witness was ordered to be re-examined after publication passed, upon an affidavit of the *witness* that his testimony was materially mistaken. The chancellor remarked there was no suggestion of tampering with the witness. He cited 2 P. Wms. 647, where Lord Chancellor King is reported to have said, that when it appears to the court that either the *examiner* is mistaken in taking the deposition, or the *witness* in making it, he thought it for the advancement of truth and justice that the mistake should be amended. A similar decision was made in *Denton v. Jackson*, (1 Johns. Ch. R. 526.) In *Smith v. Brush*, (1 Johns. Ch. R. 456, 60,) a motion to open the rule for publication on an affidavit stating the discovery of a witness to a point material was denied. The cause had been some time pending, and publication had passed six months before the motion. The motion was denied principally on the ground that the testimony, if admitted, would not alone entitle the plaintiff to a recovery, against the defendant's answer which required two witnesses, or one witness and circumstances to destroy it.

In *Boyd v. Dunlap*, (1 Johns. Ch. R. 484,) the general proposition is laid down, that liberty to re-examine witnesses rests in discretion, and is to be governed by circumstances ; and a dictum of Lord Hardwicke is referred to in 2 Ves. 270, where he says, if a witness is once examined, it might be dangerous, without an order, to let him be examined again ; the danger alluded to is that of drawing in a witness when it is known what he has already sworn to. In *Hammersly v. Lambert*, (2 Johns. Ch. R. 432,) the chancellor discussing this question of practice at considerable length, says, that without good cause shewn, and a sufficient excuse



for the delay, witnesses should not be examined after publication passed. The rule, he observes, is founded in wisdom, and was intended to guard against mischiefs which would result from holding out an opportunity to supply defects by fabricated evidence; and that such examination ought not to be permitted but upon special and satisfactory reasons, both for the previous neglect and the the further examination. In this case, the chancellor reviews the English cases, and shews that the proposition he had laid down is in accordance with them: he admits there may be exceptions.

In the case of *Hallock v. Smith*, (4 Johns. Ch. R. 650,) another motion was made for the re-examination of witnesses on the alleged ground of the insufficiency of their answers to some of the interrogatories. This motion was denied, the chancellor saying that the re-examination of witnesses was not to be granted but upon special application, and rested in the discretion of the court, and that the case did not require such re-examination. In the case of *Kirk v. Kirk*, (13 Ves. jun. 280 and 285,) the court directed a re-examination in one case before publication and in another after: both applications were made at the instance of the witnesses to correct mistakes. In *Vaughan v. Worrall*, (2 Swanston, 397, 402,) the court refused to permit the re-examination of a witness who was interested when sworn, but had subsequently been released. In one of the cases referred to, Chancellor Kent assimilates the motion for re-examination to a motion for a new trial in a court of law on the ground of newly discovered testimony. It would, I apprehend, be difficult to find any case at law where a new trial has been granted upon grounds similar to those upon which the re-examination is asked for in this case.

Assuming, then, that the practice of the court of chancery is against the present motion, it may be proper to enquire whether the peculiar circumstances of this case require the exercise of the extraordinary powers of the court; and 1. Is the testimony material? does it establish usury? After the able and satisfactory manner in which this question is discussed in the opinion of Judge Oakley of the superior court, read to us as the argument of counsel, I need only say, that the

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note in question was an accommodation note, made expressly for the purpose of raising money for Keeler and Rogers and Keeler and Mather, and not intended to be paid by the makers. It was said by counsel that it was not intended that the notes should be paid by Keeler and Rogers, because they assigned to the defendants all their property, the fund out of which payment was to be made. This is true, and the defendants as trustees and assignees, were expected to pay these notes; but the true criterion is, were the makers liable to be sued on these notes while in the hands of Keeler and Rogers? I think most clearly they were not. It makes no difference that some of the makers are assignees: their liability must exist as makers before negotiation if the notes were perfect and available. Suppose an accommodation maker or endorser of a promissory note takes a judgment, mortgage or agreement to indemnify him for the use of his name, does that make the note upon which he puts his name an available instrument before negotiation? and can he to whom the credit of his friend has been loaned turn round and sue his friend upon a note created for his accommodation? It will hardly be pretended. The notes, therefore, I consider accommodation paper, and if they were discounted by the Hudson Ins. Co. in the manner stated, to wit, that notes for \$20,000 were received, for which \$14,000 in cash were given, and the other \$6,000 paid in bonds of the company which were below par, but received at par; that insurance at 6 per cent. was paid on a life insurance which was never effected; that 6 per cent. discount and 6 per cent. called insurance, but properly usury, was paid, and say 3 per cent. loss on bonds incurred, in all 15 per cent.; can it be considered a grave question whether this transaction was usurious? It is said however that there was a *contingency* in this loan; if so, it at most extended to the \$14,000, and the two sums of \$3,000 each were palpably usurious; and when the contingency was agreed on, it must have been known to Mr. Spencer that that contingency was extremely remote, so much so as to justify the belief that it was merely a shift to evade the statute.

These notes were discounted also most palpably in violation of the restraining act and the act incorporating the Hud-

son Insurance company, and were therefore void. That point perhaps should not now be discussed, as that ground is not relied on in the answer; but I wish to correct an impression which I perceive has been made upon the minds of some of the profession. I wish to do this because possibly the erroneous impression may have arisen from a want of sufficient precision on the part of the court, or from the marginal note of the reporter, which is broader than the text will warrant. It is said that though the notes were void, being discounted in violation of the restraining act, yet the contract of loan is valid, and the money may be collected of the borrower. That has been said in two cases only: in *The Utica Ins. Co. v. Scott*, (19 Johns. R. 1,) and in the suit of the same plaintiffs against Kipp, (8 Cowen, 20.) If those cases are critically examined, it will be seen that the right of the plaintiffs in those cases to recover is placed upon *the power given them by the charter to loan money*. The Hudson Insurance Company has no such power, and therefore the contract of loan is void as well as the security, and for the same reason, viz. the want of capacity to make such contract either by parol or by taking a note. In the case of the note, there is the additional reason that the statute expressly declares it void. If the company have no capacity to make such contract, they have not the power to enforce it. The Utica Insurance Company have the power given them to invest their surplus funds, which the court, (19 Johns. 384, 5,) say gives them power to loan money in any manner not prohibited by law. They have power therefore to loan money, though not to discount notes. Hence a note discounted by them is void, but the contract of loan may be enforced against the borrower. Although, therefore, the contract of loan is valid where such contract is not prohibited by law, and the security only is rendered void by statute, still the contract of loan must have competent parties capable by law to make the contract; and incorporated companies having no powers but such as are granted or necessarily incident, a company having no such power, express or implied, has no capacity to lend money, of course cannot sue for it.

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Another ground assumed in support of the decree of his honor the chancellor is, that the testimony sought to be introduced is inadmissible under the answer. The defendants seem to have some doubts on that question, and therefore have moved for leave to amend their answer. There can be no doubt that the defendants are bound to defend themselves on the ground assumed in the answer, and no other. (12 Ves. 480. 11 id. 240. 6 Johns. R. 565.) The defendants have pleaded usury in a particular manner, and have proved it as laid in their answer, and now seek to prove it in another manner. The difference, it is said, is not material, as the \$6000, according to Keeler, was to have been paid in bonds; and according to Spencer, \$3000 had already been paid in that manner, and \$3000 more were subsequently paid in the same manner, on the 28th October; both of which sums were secured by the note in question. In my opinion, however, they are separate transactions, according to the different relations of them, and sufficiently so to constitute distinct and separate contracts, and one could not be given in evidence to support a pleading setting forth the other.

Another ground assumed by the counsel is, that the defendants being trustees and admitting that they have funds in hand sufficient to pay the note, cannot set up this defence. This ground is certainly not tenable. The defendants are some of them the original *debtors*, and some are *creditors* as well as *makers* of these notes, and also trustees. As trustees, they are to pay other creditors, and ought not to pay any illegal demands; perhaps they would not be bound to set up this defence, but there can be no doubt they are not bound by their obligation as trustees to pay notes which have no legal efficacy, and are perfectly justified in availing themselves of such a defence, as if they were individually interested.

The ground upon which the chancellor has placed his decision seems to me perfectly correct. His proposition is, that whoever seeks the aid of the equitable powers of the court must do equity; that the defendants, like any other defendants, may rely upon usury, either by way of answer or plea, and prove the usury. If they succeed in their proof, the plaintiffs must fail; but if they cannot succeed without call-

ing upon the court for the exercise of its equitable powers, the court will refuse its aid unless those who ask for equity are willing to do equity. This is certainly equitable. On the other hand, it is contended that this rule is not applicable unless a discovery is sought from the party who is to forfeit his debt by disclosures which he is compelled to make. In the case of *Fanning v. Dunham*, (5 Johns. Ch. Rep. 142,) Chancellor Kent lays down the general proposition as above and remarks, "It is perfectly immaterial, in respect to the application of the principle to the case of the debtor, who sues here, whether the usury be confessed by the defendant in his answer, or made out by proof. The plaintiff must still consent to do what is just and equitable on his part, or the court will not assist him, but leave him to make his defence at law as well as he can." In that case the plaintiff in chancery was the debtor, and was calling for the aid of equity to relieve him from an usurious contract. Here the parties making the same call are the defendants in the suit, and it seems to me they should receive the same answer. (2 Vern. 170, 173.) The same principle was applied in a court of law, in *Fitzroy v. Gwillin*, (1 T. R. 153.)

It is known to every lawyer that there are certain defences which are legal, but which are not encouraged, and are sometimes called unconscionable. Thus in a loan of money where there is an excess of interest, however small the excess contracted for may be over the legal rate of interest, it is usury, which avoids the security, and the creditor loses his whole demand. So where an indulgent creditor permits the statute of limitations to attach, the presumption of law is, that the debt is paid, though the fact generally is otherwise. When defences of this nature are interposed; and when the court must see and know that the defendant is seeking to avoid the payment of an honest debt, they will require him to bring himself within the practice of the court in the first instance, and if he makes a slip, they will not treat him with that indulgence which is freely extended to others. Hence in a court of law, the defendant who is bound to plead usury, is also bound to prove it as pleaded, and courts of law are cautious how they grant leave to

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amend to enable a party to sustain an unconscionable defence, or to aid him in a penal action.

In the case of *Jackson v. Murray*, (1 Cowen 158,) we refused leave to amend where the statute of limitation had attached, because the amendment would enable the plaintiff to evade the statute which had been passed for quieting titles in a certain section of the state. It would have enabled the plaintiff substantially to bring a new suit after the time limited by the legislature; this the court had no right to do, as it would have been virtually dispensing with the statute. But I cannot see that there is any discrepancy, as was suggested on the argument, between that case and those which require a defendant to plead the statute of limitations in the first instance, if he intends to rely on it. In the case of *The Utica Insurance Company v. Scott*, (6 Cowen, 606,) in granting the amendment, it was expressly declared, that the defendants should not plead a new unconscionable defence. It was said that the plea permitted to be amended was of the same character; but in that case the supreme court felt constrained to consider the case as if the demurrer had in the first instance been correctly decided in that court, where the judgment would have been for the plaintiffs with leave to the defendant to amend. That amendment extended to the same plea. The defendant had a right to draw a good plea to embrace the defence originally intended. So in the case under consideration, had the answer been adjudged defective in not presenting the defence which the defendants intended to present, I should be of opinion that they ought so to amend as to present the defence which they attempted unsuccessfully to rely upon. Such however is not their case. They ask to prove a defence which is distinct from that which they had presented, and which they had sworn they believed to be the true one. In *Hallagen ads. Golden*, (1 Wendell, 302,) the court refused liberty to the defendant to add a plea of the statute of limitations after issue joined, and though no reasons are given in the report, the reason assigned when the decision was made, was that given in 1 Archb. Pr. 124, which was also referred to; that where leave is given to add a new plea, it will only be done under particular circumstances, and then the new plea must

go to the merits ; and therefore the court has refused to allow a defendant to add the plea of the statute of limitations. This plea, as was said in 2 Wils. 253, excludes the merits. In *Jackson v. Varick*, (2 Wendell, 294,) it was said the rule is uniform, if a party neglects to plead the statute of limitations he loses his plea. It is a strict defence, and if the party lets it slip, the court will not relieve him. Had the defendants in these two last cases pleaded the statute of limitations defectively, leave would probably have been given to amend according to the principle of the case of *The Utica Insurance Company v. Scott*. But none of these cases afford a precedent for admitting an *additional* plea or answer of a defence which is not to be favored.

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On the whole, therefore, I am of opinion that the facts disclosed by the testimony of James Keeler shew an usurious loan ; and that the facts disclosed in the superior court of the city of New-York by Mark Spencer, also shew an usurious loan ; but that the answer put in by the defendants, though supported by the testimony of Keeler, is not sufficient to admit evidence such as that given by Spencer in the superior court ; and that therefore the chancellor in the exercise of a sound legal discretion decided correctly in refusing leave to re-examine Mark Spencer, as well for the reasons above assigned, as for the reason assigned by the chancellor, that a party asking the equitable interference of a court of equity, to enable him to set up the defence of usury, must first consent to do equity by offering to pay the money actually borrowed with interest.

The same objections exist to the application for leave to amend the answer ; both applications must be governed by the same principles, and should receive a similar decision.

I am therefore of opinion that the several orders of the chancellor appealed from in this case should be affirmed.

Justices SUTHERLAND and MARCY expressed their concurrence in the opinion pronounced by the Chief Justice.

Mr. Senator S. ALLEN was also in favor of an affirmance of the orders of the chancellor. He was of opinion that the

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granting of an application for the re-examination of a witness must necessarily be left to the discretion of the chancellor, to be exercised according to the circumstances of each case, or otherwise there would be no telling when the testimony would close or when a cause in chancery would be ended. He deemed it right too that the appellants asking for equity should do equity.

Mr. Senator BENTON was in favor of affirmance, for the reasons assigned by the *chancellor* in denying the applications.

Whereupon, it was unanimously ordered, adjudged and decreed, that the several orders of the chancellor appealed from in this case be affirmed, &c.

THE BANK OF COLUMBIA, *appellants*, and THE ATTORNEY GENERAL, *respondent*.

In a proceeding against a bank by the attorney general under the "act to prevent fraudulent bankruptcies by incorporated companies, and to facilitate proceedings against them," if, in the bill filed by way of information, facts and circumstances are stated, verified by affidavit expressing belief in the truth of those facts, and they are of such a character as to raise a fair presumption that the bank proceeded against is insolvent, and are *not contradicted or explained* by the bank, on a motion for the appointment of a receiver after due notice, the fact of insolvency will be considered as proved within the meaning of the act.

A receiver may be appointed by the chancellor in the first instance, without a previous reference to and appointment by a master.

The amount of the security to be given by the receiver rests in the discretion of the chancellor.

A direction by the chancellor to a master not to take a nomination of any person as receiver who was an officer or agent of the bank proceeded against at the time it stopped payment, or at any time within six months previous thereto, is discreet and proper.

The act of the legislature under which these proceedings are had is a valid and not an unconstitutional law as it respects incorporations granted previous to its passage.

Opinions supporting the decision of this court delivered by Mr. Justice SUMNERLAND and Senators S. ALLEN, BENTON and OLIVER. Opinions in opposition delivered by Senators E. B. ALLEN and MAYNARD.

APPEAL from chancery. On the 13th June, 1829, the attorney general of this state filed an information against the

president, directors and company of the Bank of Columbia, in which he stated the incorporation of the company on the 6th March, 1793, for banking purposes; that the company commenced and pursued the business of banking by the issuing of bank bills or notes in the name of the corporation, and by receiving deposits and making discounts, and that they continued such banking operations for the space of thirty-six years, during which time large sums of money were received by the corporation, large amounts of bank bills were issued and put in circulation, and that the corporation acquired various species of property and choses in action; and he further stated, that while large amounts of the bills or notes of the corporation were in circulation, and while the corporation was otherwise largely indebted, the said corporation, by the fraud, neglect or mismanagement of some or all of its officers and agents, had become and then was, as he the attorney general had been informed and believed, wholly insolvent and unable to pay its debts, or to redeem its bills or notes in specie, or other lawful money of the United States; and that being so insolvent, the corporation had discontinued their banking operations, stopped payment of their debts and bills or notes, and neglected and refused to pay such debts or redeem such bills or notes in specie. The bill prayed an *injunction* restraining the corporation from the exercise of its franchises, from collecting or receiving any debts due, and from paying out or transferring any monies or effects belonging to the corporation; it also prayed for the appointment of a *receiver* to take charge of the property, monies and effects of the corporation, and to distribute the same among the fair and honest creditors thereof, and for a *subpœna*, &c. The usual affidavit accompanying an injunction bill was attached, made by the attorney general, that the several matters set forth in the information, as far as they concerned his own act and deed, were true of his own knowledge, and so far as they concerned the act or deed of any other person or persons or body corporate, he believed the same to be true. An injunction was allowed and served.*

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* This proceeding was had under the *seventeenth* section of the act entitled "An act to prevent fraudulent bankruptcies by incorporated companies, to facilitate proceedings against them, and for other purposes," passed 21st

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On the 15th June notice was served on the corporation, that on the 23d June the chancellor would be moved for the appointment of a receiver according to the prayer of the information, with a copy of which and with a copy of an affidavit made by the comptroller of the state, the corporation was at the same time served. The affidavit of the comptroller was made on the 13th June and stated, that for ten days and upwards then last past, it had been and still was commonly and generally reported and believed that the bank of Columbia had stopped payment, and had neglected or refused to redeem or pay the bills or notes of the bank in circulation, and that the bank was insolvent and unable to pay its debts; and the same facts had been often published in the public newspapers, without any denial or contradiction to his knowledge or belief, and that he had no doubt that the said bank was insolvent and unable to pay its debts: and that the said bank for ten days then last past, and upwards, had neglected or refused to redeem its bills or notes in circulation.

Upon the hearing of the parties upon the above papers, the chancellor made a decretal order that a receiver be appointed according to the prayer of the information, and that he give bond with two sufficient sureties in the sum of \$20,000 for the faithful execution of his trust. The chancellor also made a reference to a master to receive from the attorney-

April, 1825. (Statutes, Vol. 7, 448, a.) By this section it is enacted, "That it shall and may be lawful for the attorney general of this state, and it is hereby made his duty whenever any incorporated bank is insolvent and unable to pay its debts, or has violated any of the provisions of the act incorporating such company, and also, it shall be lawful for any creditor of any such company to apply by petition to the court of chancery, setting forth the facts and circumstances of the case; and upon its being proved to such court that such company is insolvent, or that it has violated any of the provisions of the act incorporating such company, or of any other act which shall be binding on such company, it shall and may be lawful for such court to issue an injunction to restrain such company and its officers from exercising any of the privileges or franchises granted by the act incorporating such company, or by any other act, and from collecting or receiving any debts, and from paying out, or in any way transferring any of the monies or effects of such company until such court shall otherwise order; and it shall be lawful for such court to appoint a receiver of the property, monies and effects of said company, and to distribute the same among the fair and honest creditors thereof."

general, or any creditor of the bank or any other persons interested in the matter, nominations of a proper person to be appointed receiver, naming a day for the receiving of the nominations; directing the master, however not to receive a nomination of any person as receiver who was an officer or agent of the bank at the time it stopped payment or at any time within six months previous thereto, and ordering him by a certain day to report the names of the persons nominated and their fitness, and the names of the sureties proposed and their sufficiency. The reasons of the chancellor may be seen in 1 Paige's Ch. R. 511.

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From this order the corporation appealed. The cause was argued by

A. Van Vechten, for the appellants; and by

Greene C. Bronson, (attorney-general,) respondent, in person.

The following points were made on the part of the appellants:

1. The appellants were a corporation created and existing under the constitution and laws of this state and of the United States prior to the year 1825; the rights, privileges and powers of the corporation were not affected by any act of the legislature to which it was not a party. The act of 1825 is therefore void and inoperative as to the appellants.

2. The bill of information does not set forth any facts or circumstances to authorize the chancellor to cause a receiver to be appointed, or to take the estate of the corporation out of the hands of its officers.

3. The chancellor had not before him any legal or sufficient evidence of the insolvency of the corporation, or of their violation of any law, to justify his making any order for the appointment of a receiver.

4. The appointment of a receiver is a duty that devolves upon a master; the power of the chancellor over the question arises upon an appeal from the master's appointment.

5. The amount of security to be given by the receiver should be graduated by the amount of assets to be commit-

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ted to his charge. The chancellor had no evidence before him or means of ascertaining facts to govern his discretion, but by a reference to a master.

6. The chancellor erred in prohibiting the master from receiving the nomination of any person as a receiver who was an officer or agent of the bank at the time it stopped payment or at any time previous thereto.

The following opinions were delivered :

By Mr. Justice SUTHERLAND. It was contended, on the part of the appellants, that it was not sufficient for the attorney general to make out a *prima facie* case of insolvency, but that it was his duty to establish the fact by clear and incontrovertible evidence, before the court of chancery had any right to move in the case. If, by the *insolvency* of a bank be meant its absolute and final inability to pay its debts, it is, manifest that the fact insolvency can never be clearly and positively established, without a full developement of all its concerns. The amount of its notes in circulation, of its debts of every other description, the value of its real and personal estate in possession, the amount of debts which may be due to it, and the ability or inability of each of its debtors to pay, must first be ascertained before it can be positively affirmed of any bank that it is unable to pay its debts. If the attorney general is bound to ascertain and state all these facts and circumstances in his bill, and to arm himself with evidence to support his allegations, it is manifest that this part of the act can never be enforced, and might better be expunged from the statute book. The attorney general has no authority to demand an inspection of the books of a bank, or a disclosure of its concerns. His means of knowledge upon this subject are those and those only which are possessed by the community at large. He can judge of the actual condition of a bank only from external facts and circumstances, and those are the facts and circumstances he is bound to state in his bill and establish by proof before the chancellor.

It is not sufficient for the attorney general to allege, in general terms, that he believes a particular bank to be insolvent and unable to pay its debts ; he must state the facts and

circumstances upon which that belief is founded, and if they are such as to raise a fair presumption of its insolvency, or, as it is commonly expressed, to make out a *prima facie* case and are uncontradicted or explained by the bank, the fact of insolvency is, in my opinion, proved within the meaning of the act. The act requires that the insolvency shall be proved, but it does not direct in what manner it shall be proved; it does not say that it shall be proved by two witnesses, nor that the proof shall be direct and positive, nor that circumstantial evidence shall be insufficient or inadmissible; it leaves the matter at large; it must be proved to the satisfaction of the conscience and judgment of the chancellor, according to the established rules of evidence and the course and practice of the court. The maxim of the common law, that every man shall be presumed to be innocent until he is proved to be guilty, is as authoritative as though it were embodied in a statute, and yet how few of the vast multitude who have been criminally tried and condemned have been convicted upon any other than circumstantial evidence. The proceedings authorized by the 17th section of the act were evidently intended to be *prompt* and *summary*. The object of the legislature was to arrest the operations of failing or insolvent banks, and to save from the wreck something for their fair and honest creditors.

If *prima facie* evidence of insolvency be not sufficient to authorize the chancellor to interfere, it is obvious that no injunction can ever be issued or a receiver be appointed until the officers or directors of the bank against which the proceedings are instituted have been compelled, either as parties or witnesses, to make a full disclosure of its affairs. At the close of a chancery suit, after abundant time has been afforded to the directors and officers to collect all the outstanding debts and distribute as they may think proper all the funds of the bank, an injunction may be issued and a receiver be appointed; for what useful purpose it is difficult to imagine. Such never could have been the intention of the legislature, nor is it, in my opinion, the fair construction of the act.

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The attorney general states in his bill that he has been informed and believes that the bank had become wholly insolvent and unable to pay its debts or redeem its notes, and that it had discontinued its banking operations and ceased to redeem its notes, and he swears that he believes such information to be true. It might not, perhaps, be expedient to hold that the simple neglect or refusal of a bank to redeem its notes should, in all cases and under all circumstances, be even *prima facie* evidence of its insolvency. There may be a temporary run upon a bank which may exhaust its specie, and put it out of its power for a few hours, or perhaps days, to redeem its notes, without shaking the confidence of the public in its stability; but it is in all cases and under all circumstances a strong ground for suspicion, and when to this is added the oath of the law officer of the state, whose duty it is to enforce the provisions of this act, that he believes such bank to be insolvent and unable to pay its debts, I think considerations of public policy, as well as a due regard to the objects which it was the intention of the legislature to accomplish, require us to consider the fact of insolvency as proved within the meaning of the act in question. When we consider how important it is to the community at large and to these monied corporations that their credit should be unsuspected, and the facility with which, in the ordinary state of the country, temporary loans can be obtained to any amount upon adequate security, for the purpose of sustaining a bank, it is fair to conclude that a bank that refuses to redeem its notes is destitute of substantial funds as well as credit. But if the suspension of its operations be owing merely to accidental and temporary causes, it can easily be shewn to the court, and the presumption of insolvency will be repelled.

I am aware that it was held by the supreme court in the case of *The Jefferson County Bank v. Chapman*, (19 Johns. R. 322,) that the refusal of a bank to pay its bills was not sufficient evidence of its insolvency to prevent the *bona fide* holder or purchaser of their bills, after such refusal to redeem, from setting off such bills against a note held and prosecuted against him by the bank. But what was that case? The bank sued Chapman upon a note made by him the 26th of

April, 1819, payable in 90 days. He pleaded the general issue, with notice of set off, and upon the trial offered in evidence, by way of set off, bank bills or notes issued by the bank of a date prior to the commencement of the suit. The bank stopped payment before the defendant's note became due. The set off was objected to, first, on the ground that it did not appear that the bills offered as a set off were in the hands of the defendant before the commencement of the suit. This was held by the court to be a fatal objection to the set off, and the cause was decided on that ground. It was also said that the notes were purchased by the defendant after the bank had stopped payment and became insolvent, and that it would be a fraud upon the other creditors of the bank to allow a set off under such circumstances. The bank, the plaintiff, alleged its insolvency, to defeat the set off; and, as evidence of its insolvency, shewed that it had ceased to redeem its bills. Under such circumstances, it was correctly said by the court that the refusal of the bank to redeem its bills did not prove that it was insolvent. If a party sets up his own insolvency to defeat a claim against him, he must prove it. The fact, if it exists, must be within his knowledge, and he is bound to produce the best evidence of the fact, which from the nature of the case, may be presumed to be within his power.

But it is said that it is apparent from the 6th section of the act under which these proceedings are had, that the legislature did not intend that the neglect or refusal of a bank to redeem its bills, *for any period short of a year*, should be evidence of its insolvency. That section, among other things, provides, "that whenever any incorporated company shall have remained insolvent for one whole year, *or for one year shall have neglected or refused to redeem its notes, &c.* or shall for one year have suspended the ordinary business of such incorporation, such company shall thereupon be deemed and adjudged to have surrendered the rights, privileges and franchises granted by any act of incorporation, *and shall be deemed to be dissolved.*" By this section it will be perceived that the neglect of a bank to redeem its notes *for a year*, produces, *per se*, a dissolution of the corporation. As soon as the

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fact is judicially ascertained, the corporation is at an end. No explanation is admissible. The fact is made conclusive evidence of the insolvency of the corporation; but it by no means follows that because the legislature have said that a neglect of a bank to redeem its bills, or carry on its ordinary operations for a whole year, shall be *conclusive evidence* of insolvency, and *shall dissolve the corporation*, that a suspension of its business and a refusal to redeem for a shorter period shall not be *presumptive evidence* of the same fact, for the purpose of authorizing the chancellor to issue an injunction. The objects of the two sections are entirely different.

The next inquiry is, whether the fact that the bank had discontinued its business and neglected or refused to redeem its notes, was proved before the chancellor by competent and sufficient evidence. The attorney general produced no evidence except his own affidavit attached to his bill, and the affidavit of the comptroller of the state. The attorney general does not profess to have any personal knowledge in relation to the facts set forth in his bill, but merely swears that he believes them to be true. The comptroller states, "that for ten days and upwards then last past, it had been and then was commonly and generally reported and believed that the bank had stopped payment, and had neglected or refused to redeem or pay its bills or notes in circulation, and that the bank was insolvent and unable to pay its debts; that the same facts have often been published in the public newspapers without any denial or contradiction to his knowledge or belief; and that he has no doubt that the bank is insolvent and unable to pay its debts, and that it has for ten days last past and upwards neglected and refused, and still does neglect and refuse to redeem its bills or notes in circulation." This affidavit was served upon the solicitor of the appellants, with a notice from the attorney general that upon the information exhibited and the said affidavit, the chancellor would be moved that a receiver be appointed. The motion was opposed on the ground, as I understand it, that the neglect of the bank to redeem its notes was not proof of its insolvency within the meaning of the act. But the fact that the bank had discontinued its operations and stopped payment of its

bills, I understand to have been tacitly admitted, or certainly not denied. It was a matter of such public notoriety, and had produced so deep a sensation throughout the community, that strict and technical proof of the fact was probably deemed unnecessary, both by the parties and the court. It is also stated, in the opinion of the chancellor, that before the motion came on, similar information to that contained in the bill and affidavits presented by the attorney general had been communicated to the court by the oaths of certain creditors of the institution, who had applied for and obtained injunctions in the city of New-York. Under all these circumstances, I think we may consider the fact that the bank had stopped payment as conceded before the chancellor. A fact of such public notoriety, if not denied either by evidence or in argument, the chancellor might well consider as admitted.

The position advanced by the counsel for the appellants that the chancellor has no right to appoint a receiver, but that the appointment must be made by a master in the first instance, and can be controlled by the chancellor only upon appeal, appears to me to be unsound. The reference to a master in this and most other cases is for the convenience of the chancellor and to facilitate and expedite the business of the court; but where there is no statute regulations upon the subject, it cannot be a ground of appeal that the chancellor does himself, in the first instance, what he has an unquestionable right finally to control.

The master, in this case, was ordered to receive nominations of proper persons to be appointed receivers, to decide upon their competency and the sufficiency of their sureties, and to report to the court the names of the respective persons nominated and their fitness for the appointment, and the names and sufficiency of the several persons proposed as their sureties. It will be perceived, that under this order all the preliminary investigations are to be made by the master, and he is to report all the facts and his opinion as to the fitness of the respective persons nominated for the office. The chancellor upon this report has all the light and evidence upon the subject, and perhaps more than he would have upon a regular appeal from the master's order, and is

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possessed of all the means requisite to a judicious selection of a receiver which were possessed by the master himself. There certainly is nothing wrong in principle in the chancellor's reserving to himself, under such circumstances, the nomination of a receiver; and the course adopted by him saves some of the expense and delay which would be produced, by what is alleged to be the ordinary mode of proceeding.

Nor is there in my opinion any well founded objection to that part of the decree which directs the receiver to give a bond with two sufficient sureties in the sum of \$20,000. It is said that the amount of the security should be graduated by the amount of assets which would probably come into the hands of the receiver, and that the chancellor had no means without a reference to a master of forming any discreet opinion upon the subject. A receiver, when appointed, becomes an officer of the court, and is bound to obey all the orders and directions of the chancellor in relation to the fund in his hands. The chancellor may compel him to pay into court or to distribute the fund among the creditors of the bank, whenever it shall amount to any particular sum, and in this way prevent an accumulation of assets in his hands which shall exceed the amount of his security. He may be required to report weekly or monthly so as to keep the chancellor constantly informed as to the state of the trust fund. It is not necessary, therefore, to insure the safety of the fund, that the security given should be equal to the aggregate amount which will probably pass through the hands of the receiver; and such a regulation I apprehend would have the effect of excluding from those appointments that class of men who would be most likely to execute the trust with intelligence and fidelity. The character of the receiver as a man of business and integrity, is much more important than the amount of the security which he may be required to give. Nor is the rule contended for, that which is generally adopted in relation to public officers.

The only remaining point relates to that part of the decree which directs the master to receive no nomination of any person as receiver who was an officer or agent of the

bank at the time it stopped payment, or at any time within six months previous thereto.

The selection of a receiver from the names presented to the chancellor was a matter of sound discretion. It is not pretended that an appeal would lie from his decision upon the subject; most certainly not unless there were the most substantial objections to the person named. The refusal of the chancellor to appoint any particular individual would not be a ground for an appeal, and the appellants can hardly be said to be aggrieved by an order which excludes their officers from the list of nominations to be received by the master, when, if their names had been received, it was in the power of the chancellor practically and definitively to exclude them from the appointment. It was unnecessary for the chancellor to insert in his decree the provision in question; he might have left the master unrestricted in this respect, and have suspended his final judgment upon the subject until it became necessary for him to make the appointment; but I have no hesitation in saying that the considerations stated in the opinion of the chancellor have entirely satisfied me that it would have been an act of gross indiscretion in him, under the circumstances of this case as they existed when the decree was pronounced, to have conferred the appointment of receiver upon any of the officers of the bank. He observes, "The officers of the bank had made no expose of any of their concerns to the public; when called upon to shew cause why a receiver should not be appointed, they produced no accounts nor gave any information to the court as to the amount of their debt, or their means of payment. They did not even state when, or by what means their capital of \$169,000 had been lost, so as to enable the court to form an opinion, whether it would be right or proper to entrust the interest of their numerous creditors to the care or management of one of their number. It was impossible to ascertain without a long and tedious examination of some weeks, or perhaps months, whether it might not be the duty of the receiver to institute proceedings against every officer of the corporation under some of the provisions of the statute of 1825. If the property of the institution had been assigned

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by them to pay favored creditors, in contemplation of insolvency, or after they had stopped payment, it would be the duty of the receiver to prosecute them for the purpose of obtaining the amount for the benefit of the creditors generally; if they were indebted to the institution, it might be necessary to enforce the collection of such demands by suit; and if there had been any fraud or mismanagement of the institution by which the officers had made themselves personally liable to the creditors, it would be the duty of the receiver to investigate the subject, and expose the fraud, if any existed." I can add nothing to the force of these observations.

I have not thought it necessary to discuss the question as to the constitutionality of the act under which the proceedings in this case were instituted, and are conducted. The counsel for the appellants avowed that the point was suggested by him for the purpose of saving the ulterior rights of his clients, and not because he deemed it important in the decision of this case. I shall therefore content myself with saying, in general terms, that in my opinion there is no ground for questioning the constitutionality of the act.

I am for affirming the decree of the court below.

The Chief Justice and Mr. Justice MARCY expressed their concurrence in the opinion delivered by Mr. Justice SUTHERLAND.

By Mr. Senator E. B. ALLEN. In the view I have taken of this case it will be necessary to notice only one of the objections taken by the appellants, and that is as to the sufficiency of the proof upon which the order was granted.

What was the proof before the cancellor, and what proof does the statute require? By the statute it is enacted that upon its being *proved* to the court of chancery that any incorporated bank is insolvent, or has violated any of the provisions of the act incorporating such company, or of any other act which shall be binding on such company, it shall and may be lawful for such court to issue an injunction, &c. and to appoint a receiver, &c. The material allegations in the bill to be proved are, the insolvency of the company; its having refused to redeem its notes and bills; having discontinued its

banking operations; and having stopped payment and neglected and refused to pay its debts. It is obvious that the first branch of the attorney general's affidavit furnishes no proof of any one of these facts. He says the several matters, so far as they concern his own act and deed, are true of his own knowledge, but the bill does not shew that any one of them concerns his own act and deed; in the other branch of the affidavit he says, so far as they concern the act or deed of any other person or persons, or body corporate, he *believes* the same to be true. It is a naked belief only. He does not speak from personal knowledge or observation of any of the facts. The bill does not shew that he possesses any knowledge of the acts and deeds of other persons, which it is necessary to prove. The ground of his belief was hearsay and report. Does the affidavit of the comptroller go far enough to furnish the proof required by the statute? It is evident that he, too, swears upon mere belief without any knowledge of facts. He says that for ten days and upwards, it has been, and still is generally reported and believed, that the bank had stopped payment, and that the bank was insolvent and unable to pay its debts. So far he swears only to common report and the belief of others. He states further, that he has no doubt the bank is insolvent and unable to pay its debts, and that it has for ten days and upwards refused and still does refuse to redeem its bills, &c. All, these affidavits amount to is, that the witnesses fully believe, from hearsay and common report, that the bank is insolvent, has refused to redeem its notes and bills, and has discontinued banking operations. Could not any witness within the hearing of those reports have made the same affidavits? A man's belief of a fact, be it ever so confident, does not make him a legal witness of the fact any more than if he had never heard of it. We may all believe this bank is insolvent; but whether we do or not, is not the question. Has it been legally and judicially proved within the meaning of the statute?

It was said on the argument that no objection was made to the appointment of a receiver. How are we to know that? We must take the facts as they appear in the case.

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The rule recites that counsel was heard on the part of the appellants. There is no evidence of any admissions. There is nothing in the case to contradict the supposition that the sufficiency of the evidence was objected to on the motion for the order. The chancellor in giving his reasons for the decree says, no cause was shewn to induce the court to believe that the bank was able to pay its debts; and no information was given in relation to its concerns. Upon the silence of the appellants he holds the affidavits to be *prima facie* evidence of inability or insolvency. He observes, "that the bank had stopped payment was not conclusive evidence of its inability to pay its debts, but it was at least *prima facie* evidence of such inability or insolvency." Before this conclusion can be drawn, I would ask, how is it proved that the bank had stopped payment? The stopping of payment is supported by no stronger proof than the fact of insolvency. If the fact of stopping payment for ten days and upwards had been proved by legal and sufficient evidence, I grant it would have been *prima facie* evidence of insolvency.

It was also said on the argument that it would in most cases be very difficult to prove the insolvency of a bank except you could make its officers witnesses, and that inferior evidence should therefore be received; and if the bank were not insolvent the officers had it in their power to shew it. I thought there was force in the argument; but on reflection, it seems clear that the testimony of witnesses who knew the fact that the bank had stopped payment, or done any act which would be a violation of its charter, could be obtained without difficulty. Can it be seriously pretended that witnesses could not have been obtained in the neighborhood of this bank, who knew that the company had refused to redeem their bills, or to pay their debts, or had discontinued their banking operations?

The objection to the proof is, that it is merely the belief of the witnesses, founded upon hearsay and reports. In courts of law this kind of evidence is admitted only in cases of necessity. That there are cases where a party has been permitted to swear to his information and belief, and the adverse party, who alone could swear positively, called on to answer,

will not be denied. They are cases, I believe, where the knowledge of the fact is confined to such adverse party, and cannot be established without his admission; or where delay would be productive of injury if such evidence were not admitted. But the question here is, not whether such evidence may not in some cases be admitted, but whether it is such proof as the statute requires. The proceedings under it are rigorous and summary. The order for the appointment of a receiver amounts to a judgment of forfeiture against the company; all their important rights and privileges granted by their act of corporation are suspended or entirely taken away. It will not be a satisfactory answer to say that the company may prevent the forfeiture by disproving the facts set up in the bill, for the same proof is required before the *injunction* can issue; and if that can be issued upon rumor and reports, the mischief the legislature intended to guard against, by requiring full and competent proof, would be produced. The reputation of any bank in the state might be ruined, though perfectly solvent, and the bill holders subjected to serious losses in the depreciation of the bank paper, if an injunction can be issued upon such slight evidence. I cannot believe that the legislature intended to give to the court of chancery power to issue the injunction upon an *ex parte* application, and pronounce a final judgment of ouster without legal and sufficient proof. A different construction would seem inconsistent with the plain language of the act; it says, upon its being *proved* to such court that such company is *insolvent*, or that it has violated any of the provisions, &c. it shall and may be lawful, &c.

Our supreme court have decided in several cases, that where a statute requires *proof* to be made before a proceeding can be had, it means *legal proof*, and that jurisdiction to issue process could not be obtained without it. (*Brown v. Hinchman*, 9 Johns. R. 75. *Van Steenbergh v. Kortz*, 10 id. 167. *Vosburgh v. Welch*, 11 id. 175.) This question came directly before chancellor Sanford, in the case of the *Attorney General v. The Bank of Chenango*, (1 Hopkins' Ch. R. 596.) That was an application for an injunction against the bank and for the appointment of a receiver. A similar af-

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fidavit was made by the attorney general. The chancellor refused the injunction upon the insufficiency of the proof. His reasoning appears to me conclusive. He observes, that courts of law do not pronounce such a judgment as the statute requires until a formal and full investigation of the cause has taken place. That before an injunction can issue, the court must determine that the bank is insolvent, or has violated some provision of law; that the proof to be used in support of the application for an injunction may be taken summarily; but that all proof in courts of justice is subject to the established rules of law and reason concerning evidence.

I am of opinion the decree of the chancellor for the appointment of a receiver ought to be reversed. There being no appeal from the injunction, that will not be affected by our decision here, and the attorney general will only be required to produce further evidence of the insolvency of the bank or a violation of some provision of law, to entitle him to ask for the appointment of a receiver.

By Mr. Senator S. ALLEN. It has appeared to me that there was force in the observation made by the counsel for the appellants, that the charter granting a bank was, in effect, a contract entered into between the legislature and the corporation.

Several instances might be cited, where one of the conditions to be performed by a corporation for banking purposes was, that they should pay to the treasurer of this state, within a limited period from the passage of the act, a specific sum of money; and that the corporation should loan to the state, when by law required, a designated amount at an interest, one or two per cent. below the legal rate. These or similar provisions will be found in the charter of the Bank of America, the City Bank, and the Mechanics' Bank of the city of New-York. Now if certain chartered privileges have been granted by the legislature on the condition that the corporation perform some specific act within a given time, and the bank perform on their part all the requirements of the charter or agreement, is it competent for the legislature to impose restrictions on the company incompatible with the

original compact? In the case of *Wales v. Stetson*, as cited in Bigelow's Digest, page 181, it was held that rights legally vested in a corporation cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation.

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This question, however, so far as it relates to the Bank of Columbia, appears to be put at rest by the decision in the case of *Slee v. Bloom*, (1 Johns. Dig. 418,) where it was held, if a corporation suffer acts to be done which destroy the end and object for which it was instituted, it is equivalent to a surrender of its rights; and the Bank of Columbia, having suspended its business and refused to redeem its notes or to pay its debts, (the end and object for which it was created,) is, in this respect, destroyed and the corporation must be considered as having surrendered its chartered rights. The fact that the bank had ceased to pay its notes, was in my opinion, sufficiently notorious to authorize the information filed by the attorney general, and the proceedings had thereon by the chancellor.

A point insisted on by the counsel for the appellants was, that it was not the province of the chancellor to appoint the receiver, but that he ought to be appointed by the master. In the case of *Verplank v. Caines*, (1 Johns. Dig. 37,) it was held that the appointing of a receiver rests in the sound discretion of the court. It is also said in 3 P. Wms. 379, that a receiver is the hand of the court. If, then, the appointment is at the discretion of the court, the receiver must be the officer of the court, and consequently cannot be appointed except by the court or its direction.

The office of receiver is one of high trust, and as the manner of executing that trust, in the event of a charge of fraud or improper acts, may be brought under the review of the master by direction of the court, it would seem both reasonable and proper that the appointment should not rest with the master, but with the court.

As to the objection that the security directed by the chancellor is insufficient, I have only to observe that this is a matter which must of necessity be left to the sound discre-

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tion of the chancellor, who, in demanding security, must be guided by the nature of the trust, and the character and standing of the person, as well as the amount to be entrusted.

The direction to the master to receive no nomination of an officer or agent of the bank, was, in my judgment, a very proper restriction. The persons legally disqualified from being appointed receivers are (as per Hoffman's Chancery, 156,) trustees, solicitors in the cause; and in the opinion of an English chancellor, all professional persons are improper. The directors and officers of a corporation are the trustees of those interested in the property; and it would be improper, therefore, even if there was no legal objection in the way, to appoint either of the officers of a corporation, situated as the Bank of Columbia is, a receiver; as it might be the case, that under the direction of this very person, the inability of the institution to pay its debts may have occurred. The directors and officers are interested parties, and may be, as is frequently the case, deeply indebted to the bank; and a person thus situated, in no event ought to be placed in an office where his private interest may, if only by possibility, induce him to act in a manner incompatible with the general interest of all concerned.

There seems to be some reason too for excluding professional men as receivers; not that they would perform the duties of the office with less integrity and uprightness than others, but because in collecting the debts of a monied institution and disposing of its property, a more perfect knowledge of accounts and extended information of the responsibility and standing of the mercantile and trading part of the community is necessary than what is generally possessed by professional men; and as there must in all these cases be more or less suits instituted for the recovery of the debts due the corporation, it may be a question also whether inducements would not be held out to a man thus circumstanced to increase these suits unnecessarily, and by that means incur expense injurious to the creditors of the institution.

I am, however, in favor of affirming the decretal order of the chancellor, and of dismissing the appeal with costs.

By Mr. Senator BENTON. In discussing the questions arising in this cause, it seems proper to examine them in the order they present themselves upon a consideration of the facts and the grounds assumed upon the argument. The propriety of this arrangement will be obvious when we consider that either of two of the questions presented upon the argument by the appellants' counsel, if sustained, go to the very foundation of the whole matter here; one in the shape of an objection to the *jurisdiction* for the incompetency of the proof, and the other to the *constitutionality* of the law upon which this proceeding is founded, or in virtue of which this cause was originally instituted in the court of chancery.

At common law, chancery had no jurisdiction over the subject matter of this controversy to proceed in this manner; it is given by statute, (Sess. Laws of 1825, ch. 325,) and unless the incipient proceedings conform substantially to the requisitions of the act, and unless a case contemplated by the legislature exists, chancery can neither take cognizance of the matter nor proceed in the cause. The attorney general is bound, by his oath of office, to institute proceedings of this nature whenever a case arises within the statute. The 17th section of the act provides that the attorney general shall institute proceedings whenever any incorporated bank is insolvent and unable to pay its debts, or has violated, &c.; and also, it shall be lawful for any creditor of any such company to apply by petition to the court of chancery, setting forth the facts and circumstances of the case, and upon *its being proved* to such court that such company is *insolvent*, or that it has violated, &c. the court shall issue an injunction to restrain, &c. The statute further authorizes and directs the appointment of a receiver. It appears, then, that this summary proceeding may be had when the institution is insolvent, or has violated its act of incorporation without insolvency.

The facts and circumstances necessary to be set forth and established in the one case are simple and direct, and, in most instances, the establishment of the fact of insolvency is enough, while in the other, where the proceeding might involve an enquiry into the various and complex acts and transactions of the officers of the bank to prove a technical

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violation, or a direct and positive mis-user, might well lead to an examination into long and intricate details of facts and circumstances; and in order to get at the proof and lay the foundation for its admission, it would be necessary to specify the circumstances in the petition, or state and charge them in the bill, and in the event of proving or making out a case for the interference of the court of chancery, a perpetual injunction would, in most instances, follow.

In giving a construction to this statute which is supposed to be fair and reasonable, a construction corresponding with the intent of the legislature, it may not be unimportant to enquire into the character, duties and practices of banking institutions. Anterior to the restraining act, so called, every citizen or association of citizens had the right of banking, as the term is now understood. From motives of policy, (and public protection was undoubtedly the basis,) the legislature thought proper to abridge that right, and banking is now a franchise to be exercised only by special grant of the legislature; and the note or bill of an incorporated bank in good standing, and possessing public confidence, has long been considered the representative of the current coin of the country. The pledge to the public under this legislative grant is, that the bank will pay its depositors all sums due them on demand at their counter, and redeem their notes and bills in specie or current funds whenever presented for payment at the usual hours of banking business. Such, no doubt, is now the practice and mode of doing business, and was at the time the above statute was enacted, with all sound and solvent banks: a different course would create distrust and fears in respect to the solvency of the institution, cause embarrassment and inconvenience, and the individuals of the community would suffer loss in consequence of the depreciation of its bills in the money market. The act of 1825 is *remedial*; it professes to regulate monied corporations in certain of their acts, provides for the more speedy collection of debts owing by them, but inflicts no penalty. What, then, is the insolvency mentioned in the statute, and within the contemplation of the legislature? Is it an utter and entire destruction, subversion and loss of the whole or of a part of the

funds of the institution, and must the fact be proved; or is it a general inability to meet engagements and make payments by a redemption of the bills and notes of the bank in the usual and accustomed manner? It seems the court of chancery in England have applied the latter rule in giving a construction to the bankrupt law in that country.

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The question of intent is properly deducible from existing evils, and it cannot be a very grave proposition here whether the legislature intended to protect the debtor and not the creditor, since they have directed the law officer of the state to interpose in all cases.

When a monied corporation neglects or refuses for ten days and more to redeem its notes and bills payable at its counter, in the absence of all proof explaining the transaction, to what cause shall such an act be attributable? Shall we say the bank is perfectly solvent, and able to pay its debts and redeem its bills in circulation? The law raises a different presumption. A strong legal presumption of inability or insolvency arises from the fact of neglect or refusal to pay in all cases like the present. The establishment of this fact of neglect or refusal would seem to be enough. The proof relied upon in this case is the information, which is sworn to in the usual form of injunction bills, and the affidavit subsequently sworn to by the financial officer of the state, both of which were served upon the appellants. This is *presumptive evidence* of insolvency, and sufficient, I apprehend, to call upon the appellants to deny it, or give some explanation of their conduct in respect to the facts stated. Instead of doing so, they are entirely silent upon the subject, and the neglect to *appeal* from the order allowing the injunction may properly be deemed an admission that the evidence is sufficient to sustain it until the answer comes in.

In the constitution of the United States, (art. 1, sec. 10, subdivision 11,) certain powers are forbidden to the states individually. "No state shall pass any law impairing the obligation of contracts," is the declaration of the supreme law; and it is well settled that a legislative grant, an act of incorporation, is a *contract* within this prohibitory clause, and this

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court are not now permitted to doubt the wisdom or policy of this construction. The appellants claim certain liberties, privileges and franchises by an act or acts of the legislature, and insist that the act of 1825, ch. 325, is unconstitutional and void. In what respect, then does this act, and particularly the 17th section, impair the validity of the grant to the appellants? Does it profess to alter, modify or take away any vested right? Certainly not, any further than to provide certain peculiar and efficient remedies upon the happening of certain contingencies; and these remedies are applicable to all banking institutions of the state created under its authority: but so long as the conditions of the grant are performed on the part of the grantees or corporators, so long they remain unmolested by any proceeding under this section.

It is not pretended by the appellants that they by their grant have a right to refuse payment of their notes or bills when presented at their bank. The provision complained of is concisely this: If a banking corporation violate the conditions of its charter, or become insolvent without any other act of misuser, then certain proceedings may be instituted for the purpose of annulling the grant, or of preserving a remnant of his property and effects for the creditors of the corporation. A change or modification of the law authorizing the commencement and prosecution of suits to judgment, in a particular way, limiting the time within which actions may be commenced for preserving property from waste or destruction, and insuring a faithful application of the proceeds to the purposes intended, involve no violation of a grant or contract. The act must be direct and specific in its object pointed in its details, and must be absolute and positive, not depending upon a contingency. There is, I apprehend, a marked difference between the present provision and one which should authorize and direct the attorney general in any event, to file his information and procure an injunction against all or any of the banking institutions in the state, and by this means put an entire stop to their proceeding in business under their acts of incorporation. A right may vest

beyond the power of resumption in the sovereign authority, but the power to provide a remedy to compel a compliance with the conditions of the grant, it is presumed, always remains. The remedies must always be within the control of the legislative branch of the government, subject to alteration, amendment and modification. The appellants, by their act of incorporation, became possessed of certain rights and franchises, not here necessary to be enumerated, which cannot be altered, modified or repealed while the grant exists, without their consent. They continued in the enjoyment of them for a long series of years, and more than four years after the passage of the act of 1825. Does this act take away any vested right? Does it compel the performance of any act or duty not obligatory upon them by the very terms of the original grant? A waste, subversion and destruction of the funds and capital of the bank, power to refuse payment of debts, and redemption of notes or bills when presented for payment, and a right to become insolvent, are not presumed to be any part of the liberties, privileges and franchises usually granted to banking institutions. The 17th section of the act provides summary proceedings in cases only where corporations have violated the conditions of the grant. The alleged violations must be proved in the due course of judicial investigation; judgment without proof is not authorized or required.

In cases of insolvency, the court of chancery is clothed with power to interpose, to stop further malversations, and legal frauds, and possess itself of the residue of the property of the corporation, in order to secure an equitable distribution of it among those by law entitled to it. In this case the court of chancery, it is believed, is compelling the performance of a duty obligatory upon the appellants by their act of incorporation.

Being well satisfied of the correctness of these views, I do not see how this act can be pronounced invalid by reason of the constitutional provision of forbidden powers.

The other questions presented for the consideration of this court, raised by the appellants' counsel, appear to me to be of legal discretion entirely; and although questions purely

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of this nature may be presented to this court for its decision and judgment, I think it should appear clearly that something has been done "contrary to equity and good conscience," before this court will undertake to interfere and reverse the decision of a subordinate tribunal. Upon these principles, it is not perceived wherein the court of chancery erred respecting the appointment of a receiver. The chancellor has a perfect right to do what he can direct others to perform in his stead, unless he be controlled by legislative authority. The receiver is at all times subject to the direction and control of the court, and may be removed at any time. It might be convenient to parties, in many instances, to have the opinion of the chancellor uncommitted, on the appointment of a receiver or the allowance of an injunction. This convenience cannot in the least affect the powers of the court. There are no facts in the case, shewing the probable amount to come into the hands of the receiver. Twenty thousand dollars may be the full extent of the available funds of the bank ; but even if they were much larger, there could be no waste or diversion of them beyond the amount of the security, without the connivance of the chancellor, which is not to be presumed.

Upon the last point, I am also well satisfied that the chancellor exercised a sound legal discretion in directing the master not to receive the "nomination of any person as receiver who was an officer or agent of the bank at the time it stopped payment, or at any time within six months previous thereto." The proofs on the part of the respondent are deemed sufficient to raise a legal presumption of insolvency. These facts are not denied, and there is no attempt to explain why the bank had assumed the position of refusing to redeem its bills and pay its debts. The chancellor considered it his duty to place the remaining funds of the bank in the hands of some individual who stood indifferent between the debtor and creditor. Cases might arise in which there would be no necessity of giving such direction. I am of the opinion that the chancellor gave proper directions in this respect, and am of opinion that the order ought to be affirmed.



By Mr. Senator MAYNARD. One of the points presented for decision in this court is, "that the chancellor had before him no legal or sufficient evidence of the insolvency of the corporation or of their violation of any law to justify his making any order for the appointment of a receiver."

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The only allegation against the corporation is that of insolvency, and the question is, was there sufficient evidence of that fact presented to the chancellor?

All the powers possessed by the chancellor over the subject matter embraced in the information are conferred by the statute; there must therefore be a strict and full compliance with its requirements. The 17th section of the act, after prescribing the mode of application, provides, "*that upon its being proved that such corporation is insolvent,*" the chancellor shall issue an injunction and appoint a receiver. No kind or quantity of evidence is prescribed. There is nothing in the act to induce the opinion that any relaxation in the rules of evidence or diminution of quantity to constitute proof was authorized or contemplated. The magnitude of the powers conferred by the statute, the consequences that must result from their exercise to the corporation charged with delinquencies, and to the numerous individuals interested therein as stockholders, creditors and debtors, forbid the supposition that any such change was intended. The object of the statute was to prevent, mitigate, or remedy great evils. It is peremptory in its provisions, and upon proof of the fact, allows to the chancellor no discretion, but requires the exercise of the powers conferred upon him. It certainly was not the object of the statute that those extraordinary powers were to be exerted in a case of doubtful ability or questionable solvency. The statute is explicit and peremptory, that the imputed insolvency *shall be proved*. What then was the fact which the attorney general was required to establish in this case to justify the interference of the chancellor? The fact proved, if the evidence offered was legal and sufficient to establish any fact, was, that the corporation had stopped payment. But is that proof of insolvency? The chancellor, with manifest correctness, considered that the fact "that the bank

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had stopped payment was not *conclusive*, but only *prima facie* evidence of insolvency."

In the case of *The Jefferson County Bank v. Chapman*, (19 Johns. R. 321,) Judge Woodworth, who delivered the opinion of the court, said, "The bank stopped payment in July, 1819, but there is no proof of *insolvency*." The judge in that case may have regarded the fact of stopping payment as *prima facie* evidence of insolvency, but *not proof* of that fact. In the case of *Stewart v. The Mechanics' and Farmers' Bank*, Ch. J. Spencer said, "a bank may be quite solvent notwithstanding it fails to redeem its bill." And he quotes with approbation the language of Dallas, judge, in 5 Taunton, 548, "that a man may be in difficulties and not stop payment; he may stop payment and not be insolvent, and he may be insolvent and not be a bankrupt." Stopping payment is therefore, at best, only equivocal and inconclusive evidence of insolvency. Does proof of that satisfy the requirement of the statute, that *insolvency shall be proved*?

The difficulty of establishing the fact of insolvency does not, to my mind, furnish any reason for believing that the legislature intended a relaxation in the rules of evidence or mode of proof. If there be an intrinsic difficulty in the case, the presumption is, that view was taken and contemplated by the legislature. If they intended the chancellor should act upon a *prima facie* case, they would have made such a provision in the act. By requiring *proof* of insolvency, with a knowledge of the difficulty of furnishing it, the inference appears fair, that it was not the intention that a receiver should be appointed except in extreme cases.

It is not the fault of courts if the legislature pass laws difficult of execution. The case must be extreme indeed that will justify courts in violating any of the established principles of the common law, to give effect to a statute entirely destitute of provisions indicating such an intention on the part of the legislature.

But was the evidence sufficient to establish any fact? It consisted of the affidavits of the attorney general and the comptroller, both testifying substantially to the same things; neither stating any fact as within his own knowledge, but both

expressing their *belief*, founded upon certain public rumors. In the case of the *Bank of Chenango*, (1 Hopkins, 596,) the affidavit of the attorney general was precisely the same as that of the same officer in this case, and Chancellor Sanford held that to be insufficient proof under this statute. It is true, that the allegations in the information were different in that case but the proceedings were under the same section of the same act, the powers to be executed were the same, derived from the same source, the mode of proceeding the same, and the object and intended effect the same. It is not perceived how an affidavit which was insufficient to prove any allegation, can be sufficient to establish the fact of insolvency which is expressly required to be proved. In that case there was only one affidavit, in this case there are two : but if one is not evidence of any thing, surely the addition of another of precisely the same character cannot furnish the required proof. In this case the affidavit of the comptroller contains no statement of facts within his own knowledge affecting the corporation charged, but like that of the attorney general, contains the expression of a belief, founded upon a statement a little more amplified, of rumors, reports and publications.

The chancellor appears to have been in some measure influenced by the consideration that the appellants, when required, shewed no cause "to induce the court to believe that the bank was able to pay its debts." Were they required to furnish evidence of their ability ? When a defendant answers and is silent as to a matter that is distinctly charged, and is material, and which may be presumed to be within his knowledge, it may be deemed to be admitted. In this case the defendants had not answered, and were not required to answer. The statute requires nothing from them, in the preliminary proceedings which it authorises only upon proof, to be furnished by those who prosecute. Can that principle to be applied to them upon an order to shew cause why a receiver should not be appointed, when the attorney general is expressly required to furnish the proof of insolvency, which alone, in this case, could justify the appointment ? was the *silence* of the defendants upon a preliminary order the proof contemplated by the statute ? The appellants had certainly

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a right to rely upon the insufficiency of the proof offered in support of the application. In such a case it would be rigorous to consider an allegation proved because the party against whom it is made did not disprove it. It may well be that the officers of a corporation may not be able at all times, and upon a sudden call, to furnish proof of its ability to pay its debts, although such may be the fact. But however convincing silence may be under other circumstances, and however safe the reliance upon it as evidence may be, I am persuaded that it is not the kind of *proof* required by the statute under which these proceedings were had, to justify the interference of the chancellor.

Was the evidence offered to the chancellor legal evidence? It has been decided that the evidence to justify the issuing of process under the provisions of a statute requiring the process to issue upon *proof* "*must be legal evidence. Such evidence as would be admissible in the ordinary course of judicial proceedings.*" (10 Johns. R. 167. 11 id. 176.)

And if this kind of evidence is exacted in cases of comparatively small importance, surely equal care and strictness are requisite in matters vastly more momentous to individuals and to the public. Evidence of reports, rumors and publications in newspapers is certainly not such evidence as would be admitted in the ordinary course of judicial proceedings. If it ever could be admitted it would be necessary to give it effect, to prove that the reports, rumors and publications had come to the knowledge of the persons against whom they were to be used. If such proof had been given it might perhaps have been accompanied by evidence of a direct and immediate contradiction, or of such explanation as would deprive such reports, rumors and publications of all tendency to furnish the required proof of insolvency.

There was no evidence that the notes of the bank had ever been presented and payment refused, or that the officers of the institution had given notice that its bills would not be redeemed. The affidavits may have been exactly true as to the existence and currency of such reports, rumors and publications, and yet it might also have been true that payment had never been refused. This is not a case of necessity, re-

quiring any departure from the established course of judicial proceedings. If a bank refuse payment of its notes when presented, that is a fact which can always be unequivocally proved. Evidence of failure to redeem its bills can always be obtained by application to the institution itself. It is a matter in which there never need to be doubt or uncertainty. But every monied corporation is exposed to the circulation of adverse rumors; and it is not a matter of extreme difficulty to give them the claim to belief and confidence which they can derive from appearance in the columns of a newspaper. The situation of such institutions would be perilous indeed, if the existence and currency of such rumors, without evidence of their truth, were sufficient to justify the fatal proceedings contemplated by the section of the act in question. The object of the act is to prevent frauds; but if such a doctrine were established it would be in the power of fraudulent men, by the creation of such reports, essentially to injure, if not to ruin, the most solvent institution.

No possible injury may have resulted in this case, but the precedent would be dangerous in a matter so important, and where it would be so liable to abuse, to relax, or disregard those rules of evidence which experience and wisdom have established, to insure certainty in matters of fact.

I am therefore of opinion that there was not before the chancellor sufficient legal evidence to constitute the proof required by the statute, and that the order of his honor the chancellor should, for that cause, be reversed.

Mr. Senator MATHER was for a reversal of the order of the chancellor; concurring in the views of Senator MAYNARD on the question of the insufficiency of proof.

Mr. Senator OLIVER was of opinion that the proof originally exhibited to the chancellor was not sufficient, within the meaning of the act, but that by the course pursued by the appellants, they had admitted the *insolvency* of the bank. Instead of applying for a dissolution of the injunction, they combat the appointment of a receiver, the amount of the security required from him, and the prohibition of a nomina-

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tion of the officers of the bank to the appointment of receiver. He therefore expressed himself in favor of an affirmance of the order of the chancellor.

On the final question of affirmance or reversal the members of the court arranged themselves as follows:

*For affirmance*—Chief justice SAVAGE, Mr. Justice SUTHERLAND, Mr. Justice MARCY; Senators S. ALLEN, BENTON, ENOS, HUBBARD, OLIVER, STEBBINS, THROOP, TODD, WARREN, WATERMAN, WHEELER, WOODWARD, 15.

*For reversal*—Senators E. B. ALLEN, HAGER, MATHER, MAYNARD, MCARTY, McLEAN, McMARTIN, REXFORD, SANFORD, SMITH, and VIELE, 11.

Whereupon the decretal order of the chancellor was AFFIRMED.

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PETTIT, impleaded with others, *appellant*, and CANDLER, *respondent*.

A general denial of *fraud* in answer to a *bill of discovery* is not enough, where, in addition to a general charge of a fraudulent concealment of property by a defendant, there is a specific charge that such property is held by others in secret trust or by colorable title for the benefit of the defendant; the specific charge must be responded to or the answer will be held insufficient.

**APPEAL** from chancery. The question here is upon the sufficiency of an answer in chancery. Candler in March, 1827, filed a bill in chancery stating the pendency of two suits at law in his favor against Pettit, who had been holden to bail; that the bail had become insolvent, that Pettit was about to put his property out of his hands and to leave the state, and praying a *ne exeat* and an *injunction* restraining Pettit from disposing of his property. The writs prayed for were granted by a master. On 3d April, 1827, a supplemental bill was filed stating the obtaining of a verdict in one of the suits for \$5421, praying the benefit of the proceedings in the original suit, and for further relief. On 9th April, the chancellor dissolved the injunction for the reason that the

complainant was not entitled to it until an execution had been issued and returned unsatisfied, but he retained the *ne exeat*. On 30th June, 1828, a further or second supplemental bill was filed, repeating the allegations in the former bills, and adding a recovery in the second suit to the amount of \$1410, judgments duly entered in each suit, and writs of *fiери facias* issued in each suit, and returns of *nulla bona* thereon. The bill then proceeded to state that for a long time before the recovery of the judgments, Pettit had transacted in his own name business to a large amount in the city of New-York, and was possessed of great property, and that he had not pretended or given out that he had become insolvent or had lost any property, but that just before the recovery of the judgments in favor of the complainant against him he had suddenly stopped doing business openly or in his own name, with the avowed intention of preventing the complainant from obtaining satisfaction of his judgments; that he had so placed his property that none of it was left visible so as to be taken upon execution, with the intent to defraud the complainant; and particularly charged that Pettit, at the filing of the second supplemental bill, *was possessed of real or personal property, or other property of some name or nature, to a large amount; that he was possessed of or entitled to public stocks, to stock in banks or other incorporated companies, and to rents in real estate; that he held bill of exchange, promissory notes and choses in action to a large amount; and that property real or personal, which in fact belonged to him, was held by others in trust for him and by colorable title.* The bill stated and enumerated particular acts of fraud which it charged upon the defendant, and concluded by praying a full answer and discovery, and that the defendant might be decreed to satisfy the judgments obtained against him, and that sufficient of his property to be set apart for that purpose.

The defendant put in his answer, denying that he had made any disposition or transfer of his property with a view to defraud the complainant or to defeat his obtaining satisfaction of his judgments and executions, or that he had so placed his property with such fraudulent intent that it could not be taken under executions upon the judgments. He also de-

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nied particular acts of fraud charged in the bill, but as to several of the charges he did not answer, or answered imperfectly; particularly he did not answer to the charge that at the filing of the bill, *property real or personal, which in fact belonged to him, was held by others in trust for him and by colorable title*; and to the charge that at the time, &c. he was possessed of *real or personal property*, or other property of some name or nature to a large amount, he only answered that at the time of the obtaining of the judgments *he was not nor had he since been seised or possessed of any real estate*, omitting to say any thing in relation to his *personal property*.

Twenty six exceptions were taken to the answer, in which, amongst others, the above particulars were insisted on; and on reference to a master, all the exceptions were allowed. The defendant excepted to the master's report by a *general exception* to the whole report, and not to particular exceptions allowed by the master. The chancellor overruled the exceptions to the report, and ordered a further answer to be put in. For the reasons of the chancellor, see 1 Paige's Ch. R. 427. From this order the defendant appealed.

The appeal was argued by

G. Brinkerhoff, for appellant.

D. D. Field & Sedgwick, for respondent.

The following opinion was delivered by

Mr. Justice MARCY. I believe it was not controverted on the argument, that if any one of the exceptions to the answer was well taken, the chancellor's order overruling the general exception to the master's report was properly granted. The ground on which the appeal is placed is, that after the denial of all fraud, the answer is full to all those things concerning which the appellant could, by the authority of the court, be required to make an answer. The decision of this appeal involves, as the appellant supposes, a question as to the jurisdiction of the court of chancery to compel an answer to certain matters about which he is interrogated in the bills. If the powers of that court are as extensive as they are stated to be by Woodworth, J. in his opinion in the case



of *Hadden v. Spader*, (20 Johns. Rep. 554,) most of the exceptions to the answer are beyond a doubt well taken; but if the views of Chancellor Sanford, in the case of *Donovan v. Finn*, (1 Hopkins' Ch. R. 59,) as to equity jurisdiction in such matters are correct, the respondent is seeking disclosures in some respects beyond the power of the court to compel, and the exceptions must be submitted to a more particular examination in order to determine whether the appellant has not answered to every thing to which he could be required to answer.

The relief asked for and granted in the case of *Spader v. Hadden*, (5 Johns. Ch. R. 280,) lay within the uncontested powers of the court; but the doctrine advanced by some of the judges when that case was reviewed in this court, went greatly beyond the principle necessarily involved in it, and is supposed by Chancellor Sanford not to have the sanction of the court. Nothing can be certainly said to be established as law by this court in a particular decision but what is necessarily involved in the case decided. The truth of this proposition is shewn by the case of *Hadden v. Spader*. Mr. Justice Woodworth held that a judgment creditor, after he had proceeded to the extent of the remedies given by a court of law without obtaining satisfaction, could reach the trust property of his debtor by invoking the aid of a court of equity. He is understood to hold that the judgment creditor in such a case can resort to the debtor's *stocks* and the *debts* due to him, even where the stock was not purchased or the debts created by means of the property *fraudulently withdrawn* from the judgment of the creditor. To these views Ch. J. Spencer gave his explicit sanction. Platt, justice, yielded his assent to the conclusion of Mr. Justice Woodworth, but qualified his opinion by saying that he was "not prepared to extend the doctrine to any other cases than those wherein the trustee received goods liable in themselves to execution, under circumstances which imply fraud in fact or in law as against creditors." "In an abstract view it may appear proper," he says, "to extend the remedy in favor of creditors to every *chase in action*; but, in my judgment, such power has not been conferred on our courts of justice." Al-

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though a large majority of this court voted in favor of affirming the decree of chancellor, it can never be ascertained how the different members viewed the principles which were discussed in delivering the opinions, but not necessarily decided by that case.

Chancellor Sanford, in the case of *Donovan v. Finn*, examined with great care the doctrine advanced in the opinions given in the case of *Hadden v. Spader*, and he considers that "the cases of authority in which relief has been given to judgment creditors were in themselves cases of equitable jurisdiction, involving fraud or trust, or seeking to subject to the satisfaction of a judgment, property in itself liable to execution, by removing a conveyance which operated as a fraudulent impediment to the execution." His conclusion is, that the court of chancery "has no power to compel the debtor of a judgment debtor to make payment to the judgment creditor in satisfaction of the judgment."

There is an obvious difference in the views of these learned judges as to the jurisdiction of courts of equity in granting aid and relief to judgment creditors which it would be our duty to adjust, however difficult it should prove to be, if the decision of this case required it; but in my view, it may be decided without attempting to settle this contested boundary of jurisdiction; and any labour, therefore, for this purpose would be not only unnecessary, but unprofitable, for the power to grant relief to the utmost extent it was pushed, by any remarks made in the case of *Hadden v. Spader*, will become in a very few days a part of our system of jurisprudence by legislative recognition or adoption.

It is contended on the part of the appellant, that relief in cases like this can only be afforded *where fraud exists*; that the answer having denied all manner of fraud, the *gravamen* of the bill is removed and no further answer can be required. It is undoubtedly correct, that where a defendant denies some substantive fact which, if true, would entitle the complainant to relief, and if not true would be a complete bar to it, no further answer can be compelled till the truth of that fact is established. The case put to illustrate this doctrine is that of a bill filed by a person representing himself

to be an *heir*, and as such claiming a discovery, and the defendant putting in an answer denying the heirship. This issue must be disposed of, and in favor of the allegation of the complainant before any discovery will be compelled. So where a person is called on to answer as a *partner*, if he denies that he is such, he cannot be required to make discovery or answer further until the fact of his being a partner is established. (Cooper's E. Pl. 315, 16.) But where fraud is charged upon the defendant, and a series of transactions is specified in relation to which the fraud is alleged to exist, the defendant cannot shield himself from fully disclosing these transactions by a general denial of fraud. If a proposition so obvious as this needed support from authority, we have only to look to the case before mentioned of *Spader v. Hadden*. There fraud was most positively denied, yet relief was granted, and that too on the ground of fraud. Fraud results from the law and the facts, and the court must be made acquainted with all the facts to be enabled to determine whether fraud does or does not really exist. The defendant may, in many cases, very honestly deny fraud in a transaction which is actually tainted by it; for what constitutes fraud particularly fraud in law, is often a matter of much diversity of opinion; he therefore must answer to every material allegation, and cannot on his general denial of fraud, take his stand on the threshold of the case and resist the call of the respondent for a full development of those transactions wherein fraud is alleged to exist.

Confining the jurisdiction of the court of chancery to the narrowest limits that have ever been assigned to it, power it certainly has and exercises daily, of requiring answers to such allegations as the appellant in this case was wholly omitted to answer, or has answered imperfectly. He is charged with being the owner of real and personal property of some name or nature to a large amount; and that he has property which others hold by some secret trust, and under a colorable title. He is called on to answer to these charges. He denies having been possessed or seised of any *real estate* at the time or since the recovery of the judgments, but he omits to answer whether he had not *personal property* at the time

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of filing the further supplemental bill; and he has not stated whether he had not at that time, or when the answer was put in, real or personal property, held by other persons in *secret* trust, or by *colorable title*. The position laid down by his honor the chancellor is indubitably correct, that the respondent has a right to a discovery of the manner in which the appellant has disposed of his property, to enable the court to see whether the disposition was or was not fraudulently made. He had also a right to a discovery of property belonging to the appellant which others hold by *secret* trust or *colorable title*, to the end that any such conveyance, which should appear to be fraudulent, either in law or fact and which is an impediment in the way of the respondent's execution might be removed.

It will not be expected that a particular opinion should be given on each exception, because, as has been before observed, if a single one of the twenty-six is well taken, the decision of the court must be for the respondent.

In the particulars above specified as well as others, I think the exceptions to the answer are well taken, and I am therefore for affirming the order of the chancellor.

The CHIEF JUSTICE expressed his concurrence in the opinion delivered by Mr. Justice MARCY. He said he had not examined the main question, not deeming it necessary to the decision of this cause; his impressions however were, that under the existing law, a defendant is not bound to answer as to property which never was within the reach of an execution; that he could only be called on to respond as to such property which had been fraudulently withdrawn from the operation of an execution.

Mr. Justice SUTHERLAND also concurred in the opinion delivered by Justice MARCY, but declined expressing an opinion as to the point alluded to by the Chief Justice.

Mr. Senator S. ALLEN. The appellant insists that he has answered the points excepted to as far as he was bound and compelled to answer; and that he was not bound to disclose his interest in any public stock or stocks,

or choses in action, and the nature, amount and value of all his claims, liquidated and unliquidated.

There are several cases in which the principle has been clearly recognized; that a court of chancery has the power to compel the discovery of personal property, placed by the debtor beyond the reach of legal process; and I am unable to discover any good reason, and the counsel for the appellants has adduced none, why public stocks, notes of hand, bonds, or debts of any kind should be exempt from execution any more than other estate whether real or personal, or why the effect of a judgment should be defeated while the debtor may be in possession of a large property of the kind alluded to.

That the principle of compelling a discovery and account of such property has been acted on by our equity courts, appears from the case of *Hendricks v. Robinson*, (1 Johns. Dig. 205,) where it was held, that chancery will lend its aid to a judgment creditor, by compelling a discovery and account against a debtor or third person, who had possession of the debtor's property, and placed it beyond the reach of legal process. The same is the case of *Hadden v. Spader*, and so important has the principle been deemed by the legislature that it has been incorporated in the revised statutes, which go into effect on the first of January, 1830.

The justice and equity of this rule appears to me indisputable, for what can be more reasonable than that every man possessing the means should pay his honest debts; and if he possess the means, and place them in a situation beyond the reach of legal process, is there any injustice in compelling him to render an account of the property thus fraudulently concealed? The provisions of the insolvent laws of this state, and the practice under them, gives good reason to fear that acts of concealment are by no means uncommon, and it is of importance to the morality of the community that our courts of equity should be sustained in their endeavor to arrest this growing evil. My opinion is, that the order of the chancellor was proper and ought to be affirmed.

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Mr. Senator BENTON expressed his concurrence in the opinion delivered by Mr. Justice MARCY, but declined expressing any opinion upon the question whether a defendant could be compelled to answer as to stock, notes and other choses in action.

This being the unanimous opinion of the court, the order of the chancellor appealed from was thereupon affirmed.

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G. and B. HALL, executors, &c. *appellants*, and O. PERKINS, *respondent*.

Where a *nephew*, a simple, ignorant young man, was induced by his uncle, an advocate (*par courtoisie*) in justices' courts, to accept a conveyance of land worth not to exceed \$240 in satisfaction of a claim of at least \$500, it was held, on an appeal from chancery, that from the nature of the transaction, the inadequacy of the consideration, the relative character, capacity and connection of the parties, *fraud and imposition* might well be presumed; and a decree directing the payment of the original claim by the uncle, and a re-conveyance of the land by the nephew, was affirmed.

APPEAL from chancery. The respondent, in November, 1824, filed a bill in the equity court for the third circuit against the appellants, as executors of the last will and testament of Rowland Hall, deceased, stating substantially that when he was of the age of nine years, he was bound or placed by his father as an apprentice with Rowland Hall, his maternal grandfather, to learn the business of farming, whom he was to serve until he arrived to the age of 21, and that Rowland Hall on his part engaged to pay him, when he did arrive of age, the sum of \$500. He averred that the agreement was reduced to writing, but that he never had the custody of it, and believed it to be lost or destroyed. He further alleged that he came of age on the 22d March, 1820, having faithfully performed his part of the contract, and that Rowland Hall died in the fall of 1820, leaving the \$500 unpaid, and that the defendants are the executors of the will of Rowland Hall, and refuse to pay him. In the part of the bill in which the *pretences* of defendants are usually stated, the complainant alleged that the defendants pretended that the testator had sold and conveyed to him 40 acres of land in satisfac-

tion of his claim of \$500, but he averred that if such deed was executed, it was the voluntary act of the testator to make him (the complainant,) without his request or desire, a voter at an election, and that such deed never was delivered to him. Another pretence charged in the bill to be set up by the defendants was, that the complainant had executed a receipt in full of all demands against the estate, as to which the complainant averred that if such receipt was in existence, it had been fraudulently and unjustly obtained; that a receipt had been given by him, but it did not relate to the subject matter of this suit.

The defendants answered admitting the agreement, the service of the complainant, and his arrival of age. As to the deed mentioned in the bill, they averred that on 26th April, 1820, the testator executed and delivered to the complainant a deed of 40 acres of land for the consideration of \$500 expressed therein; that the complainant had repeatedly admitted that *he had not paid the consideration* expressed in the deed; that on 19th February, 1822, a settlement took place between Gideon Hall, one of the defendants, and the complainant relative to the claim of \$500, and another claim of the complainant for nine months services subsequent to his arrival of age, and that it was then agreed that the consideration of \$500 expressed in the deed *should be deemed a full payment* and satisfaction of the claim for services anterior to his arriving of age, and that certain notes and money should be received by the complainant in satisfaction of services performed after he arrived of age; and that in pursuance of such agreement, a receipt was given by the complainant, acknowledging to have received notes and cash to the amount of \$39,48 in full of all debts, dues and demands against the estate. They averred that from the date of the deed to the complainant he had always been considered the owner of the forty acres, and claimed and exercised acts of ownership over it.

From the proofs, it appeared that the 26th April, 1820, was the second day of the *annual election* for state officers; the testator was warmly engaged in support of Mr. Clinton, who was voted for at that election as governor, and the tes-

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tator executed several deeds to several persons to enable them to vote, and among others to the complainant, who came into the house when the deed was executed and remained about five minutes. The deeds were not read by the parties nor did either of them take possession of them. The deed to the complainant was produced; it bore date 26th April, 1820, and conveyed 40 acres of land for the consideration of \$500, (*acknowledged to have been received,*) reserving a rent. In September, 1820, the testator told a witness that he had given the complainant a lease of 40 acres; that he had been a good boy to work; that it was not all he meant to give him, *as he owed him \$500 for his services*; he meant to build a house on the lot and give him the rest of the mill lot and the mill. On the part of the defendants, it appeared that the complainant had admitted that he had agreed with the defendants to receive the 40 acre lot as a compensation for his services during his minority, and that they had executed a quit-claim of the lot to him, which was produced, bearing date 31st December, 1823, whereby the defendants released the lot for the consideration of *ten cents*, and which appeared to have been executed after the same had been surveyed under the direction of the parties, the boundaries in the deed of 1820 being alleged to be vague and indefinite. It further appeared that the complainant had admitted that he had settled with his uncle, Gideon Hall, and passed receipts in friendship, and his uncle had given him a watch. He however desired one of the witnesses to apply to his uncle to give him \$500 or something in money for the land, as he did not like it. The 40 acres are rough, mountainous land, valued at from \$4 to \$9 per acre. The complainant is described as industrious, inoffensive, simple and ignorant; the defendant, Gideon Hall, was said to practice *as an advocate* in justices' courts, having formerly himself been a justice of the peace.

The judge of the equity court, (the Hon. William A. Duer,) after a hearing on the pleadings and proofs, decreed an account to be taken of the amount due the complainant for his services during his minority. The defendants appealed to the court of chancery, and Chancellor Jones affirmed the decree and remanded the cause. On the coming in of the



report of the master allowing the \$500 with interest, the defendants excepted, and the judge confirmed the report and decreed that the defendants pay the amount due, and that the complainant release the 40 acres. This decree was affirmed by Chancellor Walworth on appeal to him, and ordered to be carried into effect. From which decree an appeal was entered to this court, where the cause was argued by

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*D. Gardner*, for appellants.

*J. L'Amoureux*, for respondent.

The following opinion was delivered by

Chief Justice SAVAGE. This is a short and simple case, addressing itself to the common sense and common justice of the plainest man, and seems to require no legal learning to decide it. The deed from the testator to the complainant when executed was a fraud upon the elective franchise; it conveyed no estate, for it was never delivered by the grantor. It was not considered by him as a compensation for services, for he spoke of it as a gift, and at the same time admitted he owed the complainant \$500. There can be no dispute that at the death of Rowland Hall the estate honestly owed Perkins \$500. How has this acknowledged debt of \$500 been paid? I answer by compelling or persuading this simple and ignorant young man to receive the 40 acres of rocks in compensation for his services. The land is estimated by some of the witnesses at \$4, and by others at eight or nine dollars; a fair medium is \$6. We may therefore consider the land worth \$6 per acre, amounting to \$240, which these uncles gave their nephew instead of \$500 and about two years interest.

It is said that inadequacy alone is no evidence of fraud. It has indeed been so decided; but inadequacy does not here stand alone. The contracting parties and their capacities should also be considered: on the one side, a simple uneducated boy, who knew only how to work on a farm; on the other, a man who had been a justice of the peace, and therefore may be presumed to have some knowledge of law. He was

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no longer a justice, but his practice was that of advocating causes before justices, and probably he was not unacquainted with the tricks and quibbles which too often disgrace inferior tribunals, and bring a reproach upon that branch of our jurisprudence. The inadequacy then consists, 1. In conveying 40 acres of mountain rocks, worth \$240, in satisfaction of a debt of about \$565, much less than half; 2. One of the contracting parties arrived at mature age, perfectly acquainted with the value of property, and from his very "vocation," in the habit of taking every advantage which the law would permit; the other an ignorant, simple, unsuspecting boy, unacquainted with property and with the arts and intrigues which too often attend more advanced age; 3. On the one side the uncle, and the other the nephew. The grandfather had hitherto been the guardian and guide of the complainant; and after his decease, to whom could this ignorant youth more naturally look for advice and protection than to his mother's brother, the executor of his grandfather's will, as one every way capable of advising him? The result, however, shews that there was some reason in the ancient law which refused to relations, who might inherit from minors, the guardianship of their persons, because it was, as Lord Coke says, "*quasi agnum lupo committere ad devorandum.*" I have thus far cited no authority; it seems to me that none can be necessary beyond an appeal to the moral sense.

It is contended by the appellants that there is not in the bill a sufficient allegation of fraud to justify the admission of evidence on that subject, and if there be a sufficient allegation, there is no evidence of fraud. The bill charges, that if the defendants should produce a receipt in full from the complainant, that such receipt was fraudulently and unjustly obtained. This is sufficient. The ground of the plaintiff's claim was matter of contract, and he resorted to a court of equity because the written contract signed by Rowland Hall was lost or destroyed; the allegation of fraud was in anticipation of the defence contemplated, and it seems to me when thus set up, it need not be so full as if made the substantive ground of complaint. Had the plaintiff below been in possession of the written contract, he might have sued in

a court of law, and the question of fraud might have been enquired into in rebutting the defence.

Fraud is often the subject of enquiry in a court of law as well as in equity; there is this difference however, that at law fraud must be proved; it must be what Lord Hardwicke calls *dolus malus*, actual fraud arising from facts and circumstances of imposition. At law, the contract of every man who is *compos mentis*, is binding and cannot be avoided in general without proof of actual fraud in obtaining it. Neither will a court of equity measure the extent of men's understandings and say that there is an equitable incapacity where there is a legal capacity; yet if a weak man gives a bond for a pretended consideration, when in truth there was none or not near so much as is pretended, equity will relieve against it. (3 P. W. 130, 1.) Fraud is sometimes also apparent from the intrinsic nature of the contract. It may be such as no man in his senses and not under delusion would make, and such as no honest and fair man would accept, which is Lord Hardwicke's second class of frauds; and his third is that which may be presumed from the circumstances and condition of the parties contracting. (2 Vessey, sen. 155, 6.)

This case partakes of both the two last classes of frauds, if not of the first. Here was a contract made which no sensible man not under delusion would make on the one hand, and which no man who had not lost all the consciousness of shame would accept on the other. One of the parties was a weak boy, the other a man of capacity, who may be presumed from the circumstances of this case, an artful intriguer in small matters. It was a contract made by an unsuspecting youth with a man in whom, from the connexion existing between them, he must have reposed confidence, and to whom he naturally looked for advice and protection. It is clearly a case, therefore, where from the nature of the transaction and the situation of the parties, fraud and imposition are to be presumed. (4 Cowen, 220.)

I am of opinion the decree of his honor the chancellor should be affirmed with costs.

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Mr. Senator S. ALLEN also delivered an opinion in favor of an affirmance of the decree.

And this being the unanimous opinion of the court, the decree of the chancellor was accordingly affirmed, with costs to be paid by the appellants.

CASE and HARWOOD, appellants, and HAIGHT and ARTHUR, respondents.

Where a party owns land adjoining one side of a stream, and also owns the bed of the stream, and conveys to another owning land adjoining the stream on the other side thereof the land under water to the middle of the stream, *reserving* to himself the right to butt a dam on both sides or shores of the stream as he shall think necessary, the parties are entitled to an equal participation in the use of the water, notwithstanding the reservation.

The *reservation* in such case has not the effect of an *exception*, it being indispensable to a good exception that the thing excepted should be part of the *thing granted*, and not of any other thing; the reservation, however, is operative as an *implied covenant* or by way of *estoppel*, securing the right provided for in the reservation.

Where there is an unlawful diversion of a stream of water from the mills and hydraulic works of a party, it is a proper case for the allowance of a preliminary *injunction*, as the injury, if persisted in, might be irreparable.

APPEAL from chancery. General Philip Schuyler, by letters patent, bearing date the 22d September, 1789, had granted to him the lower falls in the outlet of Lake George, and a small strip of land adjoining the same on the south side of the outlet. The grant included the bed of the river for a considerable distance both above and below the falls, and the premises granted were bounded by the *north side of the waters* of the outlet. On the 5th July, 1793, General Schuyler, by deed, for the consideration of *five pounds*, granted unto Samuel Deal, Peter Deal and Jane Nicoll, in fee, all the land under the water of the outlet, from the north shore thereof to the middle of the stream, extending the whole distance from the western to the eastern boundary of his tract. In this deed the grantees were acknowledged to be the own-

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ers of the *north* shore of the outlet, and in it was contained a reservation in these words: "saving and reserving nevertheless to the said party of the first part, his heirs and assigns, the right to butt any dam or dams *on both sides or shores* of the said river or waters, as he or they may think necessary. The grant was also made subject to an unexpired term of a lease to one George Trimble, for 21 years from the 1st May, 1788. The deed also contained a covenant on the part of the grantor, that it should be lawful for the parties of the second part, their heirs and assigns, at any time or times forever after the expiration of the lease to Trimble, to butt any dam or dams on both the sides or shores of the said river or waters which they might think necessary; which dam or dams, and the river or waters therein, might nevertheless be used and occupied by the said party of the first part, his heirs or assigns, on paying such proportion of the expense and charges of erecting such dam or dams, and keeping the same in repair, as should be adequate to such use and occupation.

Trimble, the lessee of general Schuyler, constructed a dam across the outlet, butting it on both shores, and erected mills on the south shore, of which dam and mills he and those claiming under him remained in possession until the 1st May, 1809, the time of the expiration of his lease. After 1809, the proprietors of the property on the north shore used the waters of the outlet for the purpose of carrying on various hydraulic operations, obtaining their supply of water from the dam originally constructed by Trimble, and the owners of the property on the south shore using the water for like purposes from the same source. This dam is near the head of the falls, crossing the outlet in a north-east direction, the outlet here bending to the north, whilst below the falls it runs in nearly an eastern course. Near the centre of the outlet there is an island with which the dam on each side is connected. The channel of the outlet at the place where the dam was originally constructed, and where it has been continued, is on the *north* side of the outlet.

In December, 1826, the respondents who have become possessed of the title formerly vested in S. & P. Deal and J. Nicoll, filed their bill in chancery, stating that Case, one of

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the appellants, for the joint benefit of himself and the other appellant, had recently erected a dam across the outlet in an oblique direction from the island near the centre of the outlet to the north bank of the outlet; that the dam was not then completed as to retain and confine the waters of the outlet, but the respondents alleged their belief that when the same should be completed so as to resist and confine the waters, it would entirely and absolutely divert the waters from the mills and other hydraulic works of the respondents on the northerly side of the outlet, to the entire destruction of the value of the mills and other hydraulic works, and to the irreparable injury of the respondents. The bill prayed an injunction restraining the appellants from proceeding in the construction of the dam, and for general relief. An injunction issued according to the prayer of the bill.

In the answer of the appellants, in whom the title of Gen. Schuyler to the premises in question is vested, it was admitted that if they, the appellants, had been permitted to complete the new dam in the manner contemplated, so as to resist and confine the waters, it would have diverted much of the waters from the mills and hydraulic works of the respondents, but would not have diverted the whole of the waters, nor involved the entire destruction of the mills and hydraulic works of the respondents; and the *right* of constructing such dam was insisted on, as reserved in the deed from General Schuyler to the Deals and Mrs. Nicoll.

The appellants contended that they were entitled to have their mills supplied with water in preference to the mills of the respondents, and that they had the right to erect such dams, butting on the north shore of the outlet, as might be necessary to secure such supply. On the coming in of the answer, a motion was made for the dissolution of the injunction, which was denied by the chancellor. (See his opinion, 1 Paige's Ch. R. 447.) From the order denying the motion the defendants below appealed to this court. The appeal was argued by

*H. Bleeker*, for the appellants.

*J. V. Henry*, for the respondents.

The following opinion was delivered by

Mr. Justice SUTHERLAND. The complainants below (the respondents here) represent the *grantees*, and the appellants represent the *grantor* of the deed from General Schuyler to S. & P. Deal and J. Nicoll; and the question is whether, according to the just construction and legal operation of that deed, General Schuyler had a right to divert the whole of the stream from its natural channel on the north to the south shore, whenever the whole of the water became necessary for his mills and other hydraulic works. The decree of the chancellor affirms he had not.

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It will be perceived that previous to the execution of this deed, neither of the parties could erect a dam extending from shore to shore. General Schuyler owned the south, and Deals and Nicoll the north bank of the stream; neither had a right to butt upon the land of the other, and the principle object of the conveyance seems to have been to obviate this difficulty, and to put it in the power of each to dam across the stream; and accordingly one half of the bed of the stream is conveyed. If the deed had stopped here, there can be no doubt that there would have been a perfect equality of right between the parties; each would have owned one of the banks and one half of the bed of the stream, with a right to an equal participation in the use of the water, according to the principals of the common law, (Ex parte Jennings, 6 Cowen, 518,) but neither would have acquired the right to butt a dam against the opposite shore. To accomplish this object, General Schuyler *saves* or *reserves* to himself a right to butt a dam or dams on both sides or shores of the river, and expressly covenants that the grantees shall also have the same right. The covenant and the exception are in precisely the same terms.

The reservation can have no effect as an exception. An exception is something reserved by the grantor out of that which he has before granted. It is indispensable to a good exception that the thing excepted should be part of the thing previously granted, and not of any other thing. (3 Cruise's Dig. tit. 32, ch. 3, sect. 48, 49. Shep. Touch. 77. Comyn's Dig. Fait. E. 5, 6, 7, 8. Croke. Eliz. 6. Coke's Litt. 47, a. 147, a.) The deed of General Schuyler did not convey

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or profess to convey any part of the north shore; he could not therefore reserve a right to build a dam against it. But though void as an exception, the reservation is binding upon the grantees and their assigns, and becomes operative either as an implied covenant or by way of estoppel.

The deed is to be construed as though the parties had mutually covenanted that each should have a right to butt a dam upon the shore of the other; and, considered in this point of view, I see no ground for contending that it was the intention of the parties that the grantor should have a greater right in the use of the water than the grantees.

Nor is such a conclusion to be drawn from the reservation by the grantor of a right to use the water from the dam or dams which might be erected by the grantees, upon his paying such proportion of the expense and charges of erecting such dam or dams as shall be adequate to such use. Suppose the grantees had expressly covenanted that the grantor should have a right to use the water from their dam, upon paying a reasonable proportion of its cost; it certainly would not be a rational construction of such a covenant, that the covenantee should have a right to take the *whole* of the water, whenever he thought proper to pay the whole expense of the dam, or two thirds or three fourths of it, as his caprice or convenience might dictate; and a more liberal construction cannot be given to an implied covenant, or a reservation, made by the grantor in his own deed. Every exception or reservation is the act of the grantor, and shall therefore be construed most strictly against him, and most beneficially for the grantee. (2 Saund. 166, 369. 10 Coke, 106, b. Com. Dig. Tit. Fait. E. 8.) It appears to me to have been the virtual intention of the parties to establish an *equality* of right in the use of this water; and such in my opinion is the legal construction and effect of the conveyance in question.

It is not denied that the effect of the dam in question when completed will be to divert a large proportion of the water from the mills of the respondents; nor is it denied that it is the intention of the appellants, if not restrained, to complete the dam; it was therefore a proper case for a preliminary



injunction, as the injury might be irreparable. (1 Brown's C. R. 583. 2 Cox. Cas. 4. 10 Ves. 193. 2 Johns. Ch. R. 164, 272. 3 id. 282. 5 id. 101. 6 id. 439. Eden on Inj. 164, note 7, b.) And the defendants having failed to establish their title by their answer, the motion to dissolve the injunction was properly denied. I am therefore of opinion that the decree below ought to be affirmed.

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Mr. Senator S. ALLEN also delivered an opinion in affirmance of the order appealed from.

This being the opinion of all the members of the court, only one senator dissenting, it was thereupon ordered, adjudged and decreed that the order of the chancellor refusing to dissolve the injunction be affirmed.

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FORSYTH, *appellant*, and CLARK & STEWART, *respondents*.

A conveyance of an estate will not be decreed in chancery where the proof of the equitable title *varies* from that set up in the bill; thus, where a state of facts was alleged in a bill creating a *resulting trust*, and the proof shewed a *subsequent agreement* to convey, it was held, that the party was not entitled to relief.

The appropriation of the joint funds of a copartnership by one of the members of a firm to the purchase of real estate conveyed to such partner in his own name will not create a *resulting trust* in favor of his co-partner, unless the funds were so appropriated in pursuance of an agreement between the parties at the time of the purchase.

Where the contracting parties, after a contract for the purchase of an estate and the payment of the consideration money, but before the execution of a deed, conspire together to defraud the creditors of the vendee, it seems a court of chancery, on a bill filed by a creditor, would deem the *equitable title* vested in the vendee, and would not permit the statute of frauds to be interposed as a bar to the setting up of such title.

Where the property of a defendant, sold under an execution, brings a sum equal to or greater than the amount of the judgment, the plaintiff in such judgment can no longer be considered a judgment creditor of such defendant, entitled to the equitable interference of a court of chancery, to set aside a *fraudulent settlement* of accounts between the defendant and a third person.

To enable a court of chancery to set aside as fraudulent a settlement between a defendant in a judgment and a third person, and to order an account, &c. such settlement must be directly charged to have been fraudulent; and all the creditors in such case should be made parties, or an offer made in the bill for them to come in.

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An answer in chancery, although responsive to a bill, if impeached in material parts by the proofs in the cause, is, like all other evidence, entitled to only diminished credit.

The priority to which a judgment in favor of the United States is entitled does not extend to create a *prior lien* on real estate; it merely gives a right of prior payment out of the general funds of the debtor in the hands of the assignee.

APPEAL from chancery. The appellant filed his bill in chancery to obtain a decree directing the respondent, Daniel P. Clark, to release and convey to him the moiety of the west half of the building in the city of Albany formerly known as the Tontine Coffee House, which the appellant alleged was held *in trust* by Clark for the other respondent, Gilbert Stewart, whose interest in the premises the appellant had acquired as a purchaser at sheriff's and marshal's sales by virtue of executions against Stewart.

It was stated in the bill that Stewart and Clark were co-partners in mercantile business from 1810 until 1819; that Stewart advanced a capital of \$12,000; that during the two first years of the connection a Mr. Tallmadge was a member of the firm, during which time the business was carried on under the name of "Clark & Tallmadge," and for the residue of the time under the name of "Daniel P. Clark & Co.;" that in July, 1815, Stewart and a Mr. Lansing being the owners of the Tontine Coffee House, agreed to sell the same, and accordingly sold and conveyed the *east* half of the building to Messrs. Webb & Dummer, merchants, trading in Albany, for the sum of \$16,000, who paid the amount to Mr. Lansing, and the *west* half they sold and conveyed to the respondent Clark for the like sum; whose *single bond* for the amount was accepted by Stewart. The bill then charged that Stewart was a joint purchaser with Clark, that there was a private arrangement or agreement then or afterwards made between Stewart and Clark that the purchase thus made by Clark should be on their joint account, and that they should be joint owners thereof, and that the deed made to Clark was taken, or afterwards agreed to be taken, and held as a trustee for Stewart, to the extent of Stewart's interest in the same. The bond given by Clark to Stewart for \$16,000, was averred to have been delivered up and cancel-

led in January, 1818, without any part thereof having been paid; and it was alleged that in September, 1819, on a settlement of the concerns of Stewart and Clark, the latter was found to be indebted to the former, independent of the interest of Stewart in the house sold, in a large sum of money, specified at \$10,000.

It was further stated in the bill that in the month of August, 1819, Stewart declared himself a bankrupt, and made an assignment of his property real and personal to Clark and one John Stewart, junior, for the benefit of certain creditors; that the purchases made by the appellant of the premises in question were made in February, 1822, and July, 1823; the first at a sale under an execution on a judgment in favor of the United States against Stewart, docketed on 11th June, 1821; the second at a sale under an execution on a judgment in favor of the appellant and his partner in trade against Stewart for the sum of 467,63, docketed 22d October, 1819.

The bill stated that the defendants Clark and Stewart pretended at the filing of the bill that the purchase of the house by Clark was on his own account and for his own benefit, and that Stewart had no interest in the mercantile business carried on in the name of "Daniel P. Clark & Co." and concluded by praying a decree compelling Clark and Stewart to release and convey to the complainant (the appellant here) the estate and interest of Stewart in the house, and for general relief.

The defendants below put in their answers to the bill, Clark putting in four answers, (the three last upon exceptions taken to that first put in.) The *trust* set up in the bill was fully denied, as was also the partnership of Stewart, and Clark subsequent to the withdrawal of Tallmadge from the firm. Proofs were taken, from which, amongst other things, it appeared that in September, 1820, Stewart applied to Judge Miller, of Cayuga county, for the benefit of the insolvent law of this state discharging the person of debtors from imprisonment. His discharge was opposed by several creditors. Upon that occasion, the respondents, Clark and Stewart, were both examined under oath, and important disclosures made, as to which, and the other facts in the case

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not already stated, the reader is referred to the opinion of Mr. Justice MARCY delivered in this court.

The cause was heard on pleadings and proofs by Chancellor JONES, who, in March, 1828, made a decree dismissing the bill, but without prejudice to a new bill, and without costs; he being of opinion, upon the case made by the bill and the proofs in support of it, that Stewart had not any estate or interest in the premises called the west half of the Tontine Coffee House, in the city of Albany, at the time of becoming insolvent and making the assignment in the pleadings mentioned to trustees for the benefit of his creditors, which could be levied upon and sold by executions on judgments against Stewart, and that by reason thereof the complainant can have no relief upon the bill filed by him as purchaser under the executions in the pleadings mentioned. From this decree the complainant below appealed to this court.

The appeal here was argued by

*S. A. Foot*, for the appellant.

*A. Van Vechten & J. V. Henry*, for respondents.

The following opinion was delivered :

By Mr. Justice MARCY. The settlement between Stewart and Clark, made in 1819, was not directly charged as fraudulent in the bill, but its fairness was incidentally involved in the matters that were in issue between the parties, and the evidence that impeached it was properly received and ought not now to be laid out of view. The respondents might have repelled that evidence, if it could be done; and with the opportunity arose their duty to do so. At all events it is not for us to conjecture what different aspect might have been put on the transaction. So far as we are required to look at it, we must look at it as it is presented to us; and so viewing it, we must say that the creditors of Stewart have most abundant reasons to be dissatisfied with the manner in which this business was closed. My investigations on this part of the case terminate in the conclusion, that Stewart

was not only a partner of Clark after Tallmadge retired from the concern until 1819, but had during all that time a large amount of funds therein under the control of Clark.

Clark states, that in part payment of the bond of \$16,000 executed by him to Stewart as security for the payment of the consideration money of the west half of the Tontine Coffee-House, he was to procure the discharge of an incumbrance of \$7,500 existing on the whole lot at the time of the purchase. This he did in September, 1816, about one year after his purchase, by executing a mortgage of the part of the lot deeded to him for the amount of the former incumbrance, including the interest that had accrued since the purchase, accompanied with his individual bond. Lansing paid to Stewart some time afterwards one half of this incumbrance, which was about \$3,750. The bond of \$16,000 given by Clark to Stewart for the consideration of the purchase, was delivered up and cancelled without the payment by Clark directly thereon of one dollar, and without Stewart's having received any thing for his interest in the Tontine Coffee-House, except one half the amount of the incumbrance from Lansing. Clark had done nothing towards satisfying that bond but a transfer to the half purchased by him the incumbrance due on the whole lot at the time of the sale, and to give his personal obligation to Roberts for the future payment thereof. For the property purchased by Clark for \$16,000, he has paid or become liable to pay the incumbrance of \$7,500, which, when it was settled in 1816, amounted to \$7,950, and Stewart, who had an interest which was sold for \$12,250 beyond his proportion of the incumbrance, has received (and that from Lansing) about \$3,750, and the balance amounting to \$8,500 remains in the hands of Clark, and all legal claim for it is extinguished, and it is contended by the cancelling of the bond of \$16,000 within twelve months of Stewart's bankruptcy; a bankruptcy which leaves him deficient in means to satisfy his creditors to the amount of \$70,000. If these transactions are as they appear to be, our system of jurisprudence would merit but little commendation if it was so defective that no relief could be afforded to the defrauded creditors. But with the amplest means of dispens-

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ing relief in such cases, it can only be effectually sought in the manner established for administering it. Has the appellant shewed a clear right to relief, and is he seeking it in an allowable way?

Stewart, at the time of his failure, was indebted to Forsyth the appellant in this case, and to his partner, in the sum of \$400, for the recovery of which he was prosecuted and a judgment obtained against him in the October term of the supreme court in 1819. Executions were issued thereon soon after, but no property was found to satisfy the debt. In March, 1822, another execution was issued against the real property of Stewart, and the premises purchased by Clark were levied on and sold to the appellant for \$550, as the property of Stewart or as property in which he had an interest.

In July, 1813, Stewart became a co-obligor with Josephus B. Stewart and Moses Willard in a bond to the United States, conditioned for the faithful performance of the duties of a paymaster by Josephus B. Stewart. The condition was broken, and Gilbert Stewart, before he assigned his property in 1819, became a debtor to the United States on this bond in the sum of about \$7000. For this debt a judgment was recovered against him, and all his interest in the premises formerly conveyed to Clark was sold by the marshal of the northern district of New-York on a *fi. fa.* issued in June, 1821, and the appellant became the purchaser for the sum of five dollars and received a deed therefor in February 1822. These sales and the purchases under them were made in the belief that Stewart had a *trust estate* in the premises, and one of the objects of this suit is to obtain a discovery of the trust, and to annul any instrument by which it may have been fraudulently released.

If I am not mistaken in the views I have taken of this case Clark and Stewart combined together to withdraw from the creditors of Stewart a large amount of his effects, and the whole scope of their answers has been to cover up or gloss over their fraudulent conduct. This charge, impeaching as it does the integrity of the respondents and imputing to them fraud extensive in amount and odious in character, should not be lightly made; the examination of the facts brings us,

however unwilling we may be, to this conclusion. A detail of them will not be expected, for it would amount to little less than a repetition of the testimony. Clark's own books shew that he misrepresented the affairs of the company at the time Tallmadge retired from it; the accounts on which the settlement was made in 1819, after Stewart had become insolvent, are grossly incorrect; and the pretences set forth by him as the true motives for abandoning the contract which he admits was made subsequent to the purchase by him, that Stewart should become a joint owner with him in the west half of the Tontine, and on which contract Stewart had paid, by giving up the bond, at the least eight thousand five hundred dollars, are effectually exploded. From answers thus impeached we were urged to withhold all credit; the counsel for the appellant asked us to throw them wholly out of view. He applied to them the maxim, *falsus in uno, falsus in omnibus*. That they have been in several important particulars seriously impeached, is certainly true; and considering them as evidence, I cannot bring my mind to yield them much consideration.

The general doctrine that an answer so far as it is responsive to the bill is evidence for the defendant, cannot be denied. An answer is often of a mixed character; the definition once given of it by a very eminent counsellor in this court is, in my judgment, exceedingly correct. In some respects, he says, it is mere pleading; in others, it is pleading coupled with evidence; and when it is neither, it is merely evidence. (1 Cowen, 745, note.) As pleading, the answers must certainly stand, and the appellant is put to the proof of the facts in issue; as evidence, they ought to be like every other species of evidence liable to be impeached and overthrown. If an answer puts three facts in issue, and the testimony taken in the cause conclusively shewn that as to two of the facts it is false, and that the defendant as to these has wilfully perverted the truth, is the answers to receive the same consideration as evidence in his favor, as to the third fact, as an answer in no respect impeached would be entitled to? I should be inclined to attach to it, in such a case, a credit diminished in proportion as it had been im-

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peached in other particulars. We are not however, as I think, called on to settle definitely this question; for though the appellant has urged us to lay aside the answers, yet he has occasionally resorted to them for admissions and disclosures found in them favorable to his views. Upon no principle can we wholly reject as evidence what is said in the answer responsive to the bill, in relation to the matters concerning which the appellant has resorted to the answers for admissions in his favor; but they ought not, in my judgment, to have the same weight as evidence in those particulars wherein they are not impeached, as they would command if they had not been discredited in any respect whatever. Circumstances must have in such cases, as they ought to have wherever the effect of conflicting testimony is to be ascertained, a great and preponderating influence.

Under the guidance of these views as to the effect of the answers, I shall now consider the facts relied on by the appellant to shew that Stewart had a trust estate in the west half of what was formerly the Tontine Coffee House in the city of Albany. Clark has a legal title to this property, and claims to be its owner. If a decree is made concerning it, his rights will be thereby affected. The statement of Stewart before Judge Miller, that it was agreed by Clark *at the time of the purchase* that he was to be jointly interested, cannot affect Clark. The answer of one defendant is not evidence against another. (1 Caines' Cas. in Err. 121. 5 Johns. R. 412.) Clark's account of that transaction is, that he purchased the premises for himself only, and gave the bond of \$16,000 for the consideration money; that shortly after he fitted up the building for stores, and *about that time* Stewart verbally agreed to take one half, and to be at one half of the expense of the repairs. It further appears, from Clark's examination and answer, that in 1818 he caused a deed to be made out to Stewart of the undivided moiety of the premises purchased by him, but Stewart delayed completing the arrangement until his embarrassment, and then refused to do it principally on the ground of his inability to pay for his part of the repairs. If there had been an agreement at the time of the purchase that Stewart should be interested there-



in to the amount of one half, or in any other proportion, and he had paid a part of the consideration money equal to the proportion he was to have in it, or if a portion of the bond equal to the interest Stewart was to have in the purchase was not to be paid by Clark, a trust would have resulted in favor of Stewart; but Clark, in his answer, denies such to have been the fact, and his statement before Judge Miller, on the occasion of Stewart's application for a discharge as an insolvent debtor, is equivocal and inexplicit. His testimony on that occasion, as stated by one witness, is substantially that a short time after the purchase he made the repairs, and *about that time* Stewart agreed to take one half of the premises: as stated by another witness, it is, that he made the purchase in July, and afterwards altered the building and made the repairs, Stewart having agreed to take one half; *that this agreement was made about the time of making the repairs.* The repairs were made, as appears from other parts of the case, in 1816, nearly or quite a year after the purchase. The fair inference, therefore, to be deduced from the testimony of Clark before Judge Miller, and his answer, is, that the agreement with Stewart to be a joint owner was made subsequent to the purchase in 1815. Do the facts attending the sale and the subsequent conduct of the parties lead to a different conclusion?

The principal circumstances relied on to show such an agreement coeval with the purchase are—

*First*, the taking the single bond of Clark as the only security for the consideration money. It appears that Clark was understood to be without any considerable means when he went into partnership with Stewart and Tallmadge, and his own account of his subsequent success proves that he could not have acquired a great amount of property subsequent to that time and previous to making the purchase. These facts are certainly not of a very conclusive nature. The single fact that a bond was actually given, situated as the parties then were, repels the very inference attempted to be deduced from Stewart's neglect to take adequate security. It is not reasonable to suppose that Stewart's insolvency was foreseen or even indistinctly anticipated at the period of the

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purchase, or that any subsequent event would happen to render it expedient for them to throw a disguise over the transaction; and without some such supposition, the actual giving of the bond by Clark for the full amount of the consideration, and the receiving of an absolute deed, are scarcely reconcilable with the existence of the alleged agreement.

*Second.* The old incumbrance on the Tontine Coffee House before the sale was, as Clark states, to be discharged by him. This he performed, as we have seen, by transferring the amount of it to the part which he purchased. The payment made by Lansing of his half of the incumbrance should have gone into the hands of Clark, and if paid to Stewart for the benefit of Clark, an endorsement should have been made on the bond. It is admitted that no endorsement either on this account or any other was ever made on it. If this fact sheds any light on the transaction of the sale, it is too uncertain to guide us safely to the result at which the appellant wishes to arrive.

*Third.* The cancelling of the bond is relied on with great confidence to shew that it never was given with an intention to be enforced against Clark to its full extent. This transaction, in my opinion, admits of an explanation (hereafter to be noticed) not inconsistent with the fact that Clark was the sole purchaser. The bond was cancelled some time after it was given; Clark says three years after; and this act is as likely to have been done, as he says it was, in fulfilment of a subsequent, as of a cotemporaneous agreement.

*Fourth.* The facts of this case leave in my mind no doubt, as I have before stated, that Stewart was a partner with Clark after Tallmadge withdrew from the company, and continued to be such till about the time of his failure. The funds of the concern were applied in the repairs of the house, and the expenses of transferring the incumbrance came from the same fund. Although these things do not harmonize with Clark's account of the matter, yet they are no better proof of an agreement that Stewart should be concerned in the original purchase, than they are evidence to confirm the statement made by Clark to Judge Miller, that an agree-

ment that Stewart should be interested in the purchase was entered into *at the time the repairs were made.*

*Fifth.* A difficulty more embarrassing than any or all of the foregoing, is the fact that as early as November next after the purchase, before the repairs were commenced, and before the existence of any agreement disclosed by the respondents that Stewart should have an interest in the premises, (except that mentioned by Stewart in his examination before Judge Miller,) the *rents* were carried into the accounts of D. P. Clark & Co. Why should the rents and profits of Clark's building be permitted to mingle with the concerns of Clark and Stewart, if no agreement existed that Stewart was to be or had already become interested in that building? The answer that assumes to account for it on the ground that Clark was ignorant of his actual relation as partner with Stewart, is not at all satisfactory to my mind.

When exploring transactions suspected to be fraudulent, it often becomes necessary to build our conclusions upon an accumulation of circumstances, and such conclusions are strong or weak according to the number and character of the circumstances by which they are sustained. Circumstances which are inconsistent with one state of facts do not, however, necessarily prove another state of facts with which they may be made to harmonize. Combine those with this case presents to us as we may, doubts and difficulties, I apprehend will arise, as to the simple question whether Stewart was a *joint purchaser with Clark* of the west half of the old Tontine Coffee House. Most of the pretences that have been set up in opposition to such a conclusion have been scattered, yet competent proof is still wanting to create in the mind a confident reliance on its truth.

It is contended on the part of the appellant that if Stewart was not a joint purchaser with Clark, he subsequently acquired an interest in the premises. It will be necessary to consider whether such was the case, and if so, whether the interest he did acquire was of such a nature as to be available to the appellant in the manner he seeks to make it available. Both Clark and Stewart admit in their answers that *there was an agreement subsequent to the purchase by Clark*

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that they should be jointly interested in the premises. From Clark's disclosures before Judge Miller, this agreement was entered into about the time the repairs were made, which was the year succeeding the sale. In his answer he states that after the purchase, but at what precise time he cannot tell, Stewart wished to take an interest in the premises, but he denies that he then assented to to any arrangement of that kind. He however says that he offered in September, 1818, to convey to Stewart one half of the lot purchased by him on his paying his proportion of the mortgage to Roberts, and of the expenses and interest: but he says Stewart made no decision until about the time of his failure, when he declined to accept it by reason of the depreciation in value of real estate in Albany, and of his pecuniary embarrassments. This statement, it will be observed, conflicts with that which he made on his examination before Judge Miller; for he then admitted there was an agreement about the time the repairs were made (which was in 1816) for Stewart to become a joint owner with him. It is also inconsistent with what he admits in his further answer; for in that he says Stewart proposed to purchase of him an undivided moiety of the west half of the old Tontine; and that he prepared a conveyance for that purpose, which was to be executed after the adjustment of the expenses of repairs and of the mortgage, which was an incumbrance on the premises; and that about that time Stewart delivered up the \$16,000 bond, and he cancelled it. Taking these disclosures of Clark and uniting them with those circumstances which I have just considered, in relation to the question whether there was an agreement coeval with the first purchase that Stewart should have an interest in it, a bargain is clearly established, and the consideration therefor paid by Stewart. It has not been pretended that the giving up of the bond was not done in fulfilment of this bargain. When it was entered into is quite uncertain. Clark's statements on this point are contradictory. I am inclined to think it existed earlier than he has admitted in his answer, and as early as he stated in his testimony before Judge Miller. There are several reasons for believing that this arrangement was made about the time the incumbrance

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was changed, which was in the beginning of September, 1816. On the second of that month Clark endorsed a receipt in full on his deed, which was signed by Stewart. This is stated in the receipt to have been done on a settlement. What settlement could this have been? Not that of the copartnership concerns, for that settlement was not made till 1819. If the bond was in existence and considered of force when this endorsement was made, it was not according to the fact. The existence of the arrangement as early as 1816 explains some of the circumstances which were urged upon our consideration as evidence of an agreement between the respondents at the time of sale. It may account for the company's being charged with the expenses of the mortgage which Clark gave, and with the \$4375 of repairs incurred about this time.

Nothing can be more futile than the reasons which have been assigned for the abandonment of the contract by Stewart. These reasons are, his pecuniary embarrassments and the depreciation of the property. What obstacle did Stewart's pecuniary embarrassments present to its fulfilment? He had nothing to pay. The joint funds of himself and Clark had made the repairs; he had therefore nothing to advance therefor, but if any thing was to be paid on that account, it was going to Clark, who then actually owed him many thousand dollars. The principal of the mortgage to Roberts had not then been called for, and the want of means to pay it presented no difficulty. If it had been called for, it was Clark's debt, and he alone was to pay it. The cancelling of Clark's bond had operated as a payment to him of more than Stewart's proportion of the consideration money. On the adjustment of the accounts, Stewart could not have been required to pay a single dollar, but would have had a just claim against Clark for a considerable balance: for the joint fund of the company had been taken to pay the interest on the mortgage to Roberts which belonged to Clark exclusively to pay. Stewart's embarrassment, therefore, was or should have been an inducement to him to fulfil rather than to abandon the contract. As Stewart had paid more than a moiety of the consideration, and a full moiety of all the expenses for repairs

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and of the interest on Clark's mortgage to Roberts, the property must have so far depreciated as to have become entirely worthless before he could have had any motive to abandon the contract on that account. To my view, this pretended abandonment of the contract, resolved on as it was after Stewart's insolvency, and stripped as it was of all the pretences that have been thrown over it, presents nothing but a fraudulent device to deceive Stewart's creditors.

On the 20th of September, 1819, Clark and Stewart came to a settlement, and on that occasion a release was executed by the latter to the former, which, in its language, has no particular reference to any interest Stewart might have in the west half of the Tontine Coffee House, but by its general terms, would convey to Clark whatever right Stewart had therein. One object of the bill was to set this release aside as fraudulent. This would be done without any hesitation, if it stood in the way of any relief the appellant can claim. It was expressly and repeatedly admitted by the respondents counsel on the argument that this instrument had no relation whatever to the real property in question. It is not, therefore, considered as presenting an obstacle to any claim which the appellant may have to that property.

I am therefore brought to the conclusion that Clark, *subsequent*, to his purchase in 1815 of the west half of the Tontine Coffee House, entered into a contract with Stewart for the sale of a moiety thereof; that Stewart, by delivering up Clark's bond for \$16,000, actually satisfied him for the consideration agreed to be given therefor; that the subsequent abandonment of the contract (if it in fact ever was abandoned) was an invalid act by reason of its having been done in fraud of Stewart's creditors; and the release executed in 1819 was not designed and should not now be permitted to have the affect of discharging any interest of Stewart in the premises derived from that contract.

We are next to enquire whether Stewart's interest arising from this subsequent purchase, or otherwise, is of such a character as that it could be sold on execution. Where a person purchases and pays his own money for real estate and takes the conveyance thereof in the name of a third person,

a trust results, by implication of law, in favor of the purchaser, without any agreement or understanding to that effect. This well known and undisputed principle has been applied to the present case. It is said Stewart furnished the funds with which Clark made the purchase. This assertion is not borne out by the facts of the case. Clark, in the first instance, used no funds for that purpose; his own bond was substituted for the payment of the consideration money. In discharging the old incumbrance, he used no funds, for that was done by giving his individual bond and mortgage to Roberts. If he afterwards appropriated the funds in his hands belonging jointly to himself and Stewart to discharge the obligations which he had in the first instance laid himself under in making this purchase, a resulting trust would not be thereby created unless it was unequivocally shewn that there was an agreement at the time of the purchase that these funds should be so appropriated. (5 Johns. Ch. R. 1. 2 id. 405.) The interest which Stewart may have in the premises does not, therefore, arise from the appropriation of any portion of his funds at the time of the sale to Clark.

The effect of the subsequent agreement, that Stewart should become a purchaser of a part of the premises, is next to be considered. In the case of *Bogert v. Perry and others*, (1 Johns. Ch. R. 52,) the chancellor decided that an interest that could be sold on an execution was not created by a contract to purchase, by the payment of a part of the consideration, and by taking actual possession of the premises; but he strongly intimated that if the contract had been fulfilled, so that the purchaser would have been entitled to a deed at the time judgment was obtained against him, the statute of uses would have applied and vested in him an interest that might have been sold under a judgment. Subsequent to this decision there arose in the supreme court a case very similar to that to which the chancellor supposed the statute would apply: the case of *Jackson, ex dem. Seelye, v. Morse*, (16 Johns. R. 197.) By that case it appears that one Beekman had bargained for a lot, and paid the whole consideration money; and that before the deed was given it was sold on an execution against him. The suit was by the purchaser

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for the recovery of the possession. Ch. J. Spencer observed, in delivering the opinion of the court, that Beekman acquired nothing but an equitable interest in the premises in consequence of his agreement with White, (with whom the contract for the purchase was made,) and the payment of the consideration money. "It is essential, (he said,) from the very words of the statute (of frauds) to a resulting trust, that it should arise from some conveyance or deed." This was purely a case of bargain and sale, which, by the common law, might be made without deed; but since the statute of frauds it is otherwise. (Comyn's Dig. Tit. Uses, D. 1. id. Tit. Bargain and Sale, B. 4.) In a legal point of view any attempt to set up a trust, other than one arising by implication or construction of law, is met and put down by the express provision of that statute which declares that all declarations or creations of trust or confidence of any lands, &c. shall be manifested or proved by some writing signed by the party who is or shall be by law able to declare such trust, or else they shall be utterly void. (1 R. L. 79.) No such writing is shown to exist in this case.

There is an apparent discrepancy between the opinion of Ch. Kent, in the case of *Bogart v. Perry*, and that of Ch. J. Spencer, in the case of *Jackson v. Morse*. In the latter case it was said that, admitting the whole consideration was paid, the purchaser had nothing but an equitable interest before the deed was executed; in the former the chancellor said the statute of uses might have applied and vested an equitable title in the purchaser, if the whole consideration had been paid. There is, however, no real incompatibility in the doctrine of these decisions. The one proceeds on the ground that there was no fraud, and the other on the assumption of fraud. Lord Hardwicke said he was not bound down by the statute of frauds and perjuries to construe nothing a resulting trust but what was called trusts by operation of law. (2 Atk. 150.) It is the doctrine of equity that frauds beget trusts, and we are strongly urged to raise a trust in this case on such a basis. If there had been a contract that Stewart should become the purchaser of one half of the premises in question, and a performance, or a part performance on his



part, and a refusal by Clark to execute the proper conveyance; or if they have conspired together to defraud the creditors of Stewart, and, in pursuance of such design, have annulled the contract, an equitable title would probably vest in Stewart for what he had purchased, to which a court of equity would not perhaps permit the statute of frauds to be interposed as a bar, for the purpose of defeating it. In equitable contemplation such a contract is executed, because what has been omitted to be done to make it legal and binding has been omitted through fraud.

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A further and more serious difficulty in the way of granting the relief asked for in this case arises from the state of the pleadings. The object of this suit, so far at least as the real estate is in question, is to give to the appellant as purchaser of Stewart's title, the same relief that Stewart would have been entitled to if he had been in court, not implicated in any fraud, asking for a specific performance of the contract. The appellant must, therefore, present much the same matter for the consideration of the court as Stewart, to whose rights he has succeeded, would be required to present was he the complainant. He must state with reasonable particularity the contract, a specific performance of which he seeks to have decreed. If that which he set forth in the bill is denied and a different one admitted or established by proof, a decree for the performance of the latter cannot, I apprehend, be entered. In the case of *James v. M'Kernon*, in this court, (6 Johns. R. 543,) Spencer, J., observes, that "it is an invariable and universal rule of the court of chancery to ground its decrees on some matter put in issue between the parties by the bill and answer, and the rules and practice of that court require, in forming the bill, that the matter of it be plainly and succinctly alleged with all necessary circumstances, as time, place, manner, and other incidents." Ch. J. Kent, in the same case, says, "it is a settled and well established principle, that the relief must be agreeable to the case made by the bill, and not different from it."

It will be recollected that courts of equity in compelling specific performance, do what is against the letter, and sometimes it has been feared, against the spirit of a statute. Later

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decisions have been made with greater caution and more respectful regard to its provisions than were formerly observed. It is very evident from the whole class of cases relative to specific performance, that the agreement to be enforced is required to be very distinctly and particularly stated in the bill. The identical agreement must be admitted or its performance will not be compelled, (Rob. on Frauds, 155 ;) and evidence to establish it will not be received *aliunde*, unless the decree proceeds upon the principal of part performance. (2 Bro. Ch. R. 566.) Is the contract, the performance of which will be decreed if the appellant prevails in this case, set forth in the bill and put in issue by the answer ?

Stewart's title to or interest in the premises purchased by the appellant must result, according to the allegations of the bill, from a private arrangement or agreement entered into between Clark and him *at the sale* by Lansing Stewart, or afterwards, that the purchase should be on joint account, and that they should be joint owners of the property ; and that although a deed was given by Stewart and Lansing to Clark for the premises sold, he took, or afterwards agreed to take and hold the same as trustee for Stewart to the extent of his interest, and although Clark gave to Stewart a bond for \$16,000, the amount of the purchase money, it was never intended by either him or Stewart that it should be paid. This is the agreement charged in the bill ; it is denied in the answer of Clark and Stewart, and, as I have before stated, not satisfactorily proved : no performance can therefore be asked or expected. Nor are the statements of the bill sufficiently comprehensive to embrace the agreement which Clark admits was entered into in 1818. The whole tenor of these statements amount to nothing more than charging an agreement for a joint interest in the premises purchased by Clark in 1815, made cotemporaneously or nearly so with that purchase ; and any contract made between them after the first sale was completed, and after the title was absolutely vested in Clark, does not seem to have been contemplated at the time the bill was drawn.

Whether any and what relaxation of the ordinary rules observed in proceedings of this nature, when the contracting

parties are before the court, is to be extended to creditors, to facilitate their attempts to give effect to a contract which their debtor has fraudulently rescinded, I will not undertake to say ; but I am very confident that it would be dangerous to compel a performance of a contract not directly and clearly charged in the pleadings. My conclusion is, that if Stewart had a trust estate in any part of the premises purchased in July, 1815, by Clark, that passed to the appellant by the sale under the executions issued against Stewart, the contract from which that interest resulted is not so stated in the bill that this court can properly decree a specific performance of it.

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Something was said on the argument about the priority of claim under the judgment of the United States ; but this priority in favor of that government has no application to the case before us. It is defined by Judge Story, in the case of *Conrad v. The Atlantic Insurance Company*, (1 Peters' Rep. 39,) to be only "a mere right of prior payment out of the general funds of the debtor in the hands of the assignees." It does not amount to a prior *lien on real estate*, and if it did, it could not create a lien on property wherein the debtor of the U. States had no saleable interest.

But the bill in this case extends to objects beyond those I have considered, and seeks relief for the appellant as a creditor of Stewart. Does he sustain that relation? His judgment, which was recovered in October, 1819, amounted to \$447,73, and the sum levied by virtue of the execution issued thereon was \$550. It was collected in January, 1822, and it no where appears (and indeed a calculation shews that it could not be) that any balance remained due on that judgment after the sale. When the appellant's judgment was satisfied, his character as creditor was thereby annihilated ; and without that character he can have no right to investigate the frauds alleged to have been practised by the respondents. I am aware of the provision of our statute, (1 R. L. 504,) which gives a remedy to a purchaser on an execution against the plaintiff or defendant therein, in case he is *evicted* on account of any irregularity in the proceedings, or want of title in the person against whom the execution issued, or by

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reason of any prior incumbrance. I will not say that the appellant as purchaser cannot claim the benefit of this statute and recover against Stewart to the amount bid by him, but it is very obvious that his case is not that contemplated by the act. If he is in truth a creditor, he is not a creditor with an unsatisfied judgment.

Admitting him to be a creditor, still there are difficulties in the way of granting the relief sought to be obtained that cannot in my judgment be removed. The general settlement in September, 1819, is not charged in the bill to have been fraudulent. In relation to it, the bill only states that the respondents then accounted together and found a large balance due to Stewart, a balance of ten thousands dollars and upwards, for which, or for a part of it, Clark gave his bond to Stewart. This cannot be understood to be a direct, nor, as I think, an indirect allegation of fraud in the settlement; yet to pretend that it was otherwise than fraudulent could not be done without overlooking a mass of convincing testimony. To set it aside on the ground of fraud before fraud had been explicitly imputed to it by the bill, and perhaps before Clark had considered himself directly called on to sustain its fairness, would, I apprehend, be an unprecedented mode of proceeding. It would be explicitly condemned by the authority of the case of *James v. M'Kernon*. There the bill was filed for a general account of moneys received; the answer set up an agreement in relation to these moneys, and the proof was sufficient, as the chancellor supposed, to impeach the agreement on the ground of fraud; he therefore treated it as a nullity. The decision of this court was, that the agreement could not be assailed for fraud, be it ever so clearly made out, because there was no allegation in the bill that it was fraudulent. So this settlement by Stewart and Clark, which professed to adjust all the demands between them, must stand until the fraud imputed to it is put in issue and proved, or admitted by the pleadings.

As all the creditors of Stewart would be entitled to share rateably in the funds belonging to him that should be found on a proper investigation to have been fraudulently placed in the hands of Clark, it appears to me to be a reasonable

suggestion that they should all be made parties to the suit by which these funds are to be reclaimed, or an offer made to them in the bill to come in as parties.

I am free to confess that the respondents now stand before us in an unfavorable light, and it is but reasonable to entertain vehement suspicions of fraudulent conduct on their part; I am also sensible of the many obstacles that creditors must encounter ordinarily in unmasking such conduct, and would not make unreasonable requirements of them. I have carefully searched through the case to find enough in the allegations as well as the proofs to warrant a decree that should restore to the appellant and the creditors of Stewart what there is much reason to believe has been improperly withheld from them. I have stated the difficulties I have encountered, and they are, in my judgment, such as constrain me to decide in favor of an affirmance of the decree in the court below.

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Mr. Senator S. ALLEN also delivered an opinion in favor of an affirmance of the decree of the chancellor.

On the final question, Shall the decree in this case be affirmed or reversed? the members ranged themselves as follows:

*For affirmance*—The CHIEF JUSTICE, Mr. Justice MARCY, and Senators E. B. ALLEN, S. ALLEN, BENTON, HAGER, MATHER, MCARTY, McLEAN, OLIVER, REXFORD, SANFORD, STEBBINS, THROOP, TODD and WHEELER.

*For reversal*—Senators BOUGHTON, ENOS, HUBBARD, McMARTIN and WOODWARD.

Whereupon the decree of the chancellor was affirmed, but without costs and without prejudice to a new bill to be filed by the appellant, if he shall be so advised, &c.

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Where a vessel insured against the perils of the sea on a voyage from the *East Indies to Holland* was greatly damaged, and put in to the *Isle of France*, from whence advice was sent to *New-York* to the assured, who forthwith abandoned the vessel to the underwriters there as for a *total loss*, giving notice on the *sixth day of July*, and in the mean time the master had caused the vessel to be repaired, so that on the *twenty-eighth day of June* she sailed from the *Isle of France*, being tight, staunch and strong, bound to a port in *Holland*, where she subsequently arrived in safety, it was held, although a technical total loss had originally occurred, that the plaintiff was not entitled to recover as for such loss, but could recover only for a *partial loss*.

If a master of a vessel, in the exercise of his legitimate duties as the agent of whom it may concern, converts a *total* into a *partial* loss before abandonment, the fact that the loss is no longer *total* takes away the right to abandon; and the result is the same where a *total loss* is converted into a *partial loss*, by the acts of a stranger.

If the vessel is abandoned while the loss continues total, all the intermediate acts of the master are the acts of the underwriters; but if the property be restored before abandonment, the right to abandon is gone, and the acts of the master will be considered the acts of the assured.

While it is doubtful whether the assured will or will not exercise his right of abandonment, the acts of the master cannot destroy the right to abandon.

Where repairs are made by the underwriters or by the master as their agent, and the voyage is not lost and the vessel arrives in safety, the assured cannot abandon.

It is a well settled rule of *American* insurance law, that if a vessel is damaged by any of the perils insured against, so that the necessary repairs to restore her to her former state and render her sea-worthy will exceed *three fourths* of her value before the disaster, the owner is not bound to repair, but may abandon as for a total loss. This is usually called an injury to more than *half her value*, because one third of the expense of repair is deducted, new for old.

ERROR from the supreme court. This was an action on a policy of insurance on *one half* the body, tackle, apparel and other furniture of the ship *Frances Henrietta*, the whole valued at \$20,000, on a voyage from *Antwerp* to one or more ports in the *India* or *China* seas; and at or from the port or ports of lading to *New-York*, or to a *port in Europe* not north of *Holland*. The vessel sailed from *Batavia* in the *East Indies* on her return voyage on 24th January, 1819, bound for *Antwerp* with a full cargo, most of which belonged to the

plaintiff, (Dickey.) From the 20th of February to the 3d of March, the vessel encountered a succession of squalls, gales of wind and heavy cross seas, by which she became very leaky, and it was deemed impossible to navigate her to Europe in her then condition, and the master put into Port Louis in the Isle of France, where she arrived on 7th March, 1819, and a survey taken, but before it was completed the vessel was driven on shore by a hurricane, and sustained further injury. Several surveys were taken, viz. on 10th, 16th and 20th March; on the 30th of that month she suffered from the hurricane, and on 14th April a fourth survey was held and repairs recommended. On 6th July the plaintiff gave notice to the defendants that he had advice from the Isle of France, dated 12th April, that his ship had put into that port in distress, and that she had subsequently suffered great damage from a hurricane, in consequence of which he abandoned to the defendants, the underwriters, so much of his interest in the vessel as they had insured, and that he would claim from them thereon a total loss.

On 7th May, 1819, the repair of the vessel was commenced at the Isle of France under the direction of the master, and completed by the 28th June. The expense of the repair was upwards of \$14,000, and the whole disbursements of the vessel at Port Louis upwards of \$20,000. A part of the cargo belonging to the plaintiff was sold under the direction of the court of admiralty of the Isle of France to defray the expense of repairs; the amount of the proceeds was \$10,972,50; more of the cargo could not have been sold without great sacrifice; the master therefore borrowed \$8,925 upon *respondentia*, and executed a *respondentia* bond, in which he also bound himself personally for the payment of the money. The residue of the cargo was re-shipped, and other goods taken on board on freight, and on 28th June, 1819, the ship being tight, staunch and strong, set sail from Port Louis bound to a port in Holland. She arrived in safety at Antwerp on 1st October, 1819, where her cargo was delivered in good order to the consignees, &c.

At the circuit, a verdict was taken by consent for the plaintiff for a nominal sum, subject to the opinion of the

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supreme court on a case to be made, the amount of the verdict to be increased or diminished as the court should direct ; either party to be at liberty to turn the case into a special verdict or bill of exceptions. The supreme court, in February term, 1825, decided that as the master had repaired the vessel, and she was in the actual prosecution of her voyage at the time of the abandonment, although that fact was not then known to either the plaintiff or the defendants, the right to abandon was gone and the assured was entitled to recover only as for a *partial loss*.

The other *half* of the vessel was insured by the New-York Insurance Company, against whom also a suit was brought. The same questions arose in both cases. That cause was argued in the supreme court by D. B. Ogden and Thomas Addis Emmett, for the plaintiff, and by J. Duer and G. Griffin, for the defendants, and a similar decision had, or rather the opinion of the court in that case is the opinion of the court in this, the decision in this cause being founded upon the reasons assigned in that. For a report of the *arguments* of counsel and the *opinions* of the judges in that cause, the reader is referred to 4 Cowen, 222 to 249.

A writ of error was brought by the plaintiff below to reverse the judgment of the supreme court. The cause here was argued by


P. A. Jay & D. B. Ogden, for the plaintiff, and by

Ogden Hoffman & J. Duer, for the defendants.

For the plaintiff in error, it was insisted that the right of abandonment depended upon the fact whether the damage sustained by the vessel amounted to one half her value, and although notice of the abandonment was not given until after repair, the plaintiff's claim as for a *total loss* was not affected. Having given notice as soon as he received information of the disaster, on the presumption that the damage would exceed fifty per cent. and the result proving that the vessel was injured beyond half her value, the plaintiff's right was perfect, and could not be divested by the act of the master in repairing the vessel. Had the injury occurred on the coast

of this country and an abandonment been made immediately after receiving notice of the event, there could have been no doubt of the right of the plaintiff to claim as for a total loss; and having given notice as soon as advised of the disaster, the claim of the plaintiff is equally unquestionable under the circumstances of this case. His right depends upon the extent of the damage and upon the fact of giving notice without delay, which right cannot be impaired by any act of the master subsequent to the happening of the loss, who, from that moment, became the agent of the underwriters. The counsel contended that there was a clear and manifest distinction between this case and that of an abandonment for capture, where a re-capture takes place before the bringing of the action, as in *Bainbridge v. Nelson*, (10 East, 329.) In that case, there was a mere interruption of the voyage for a few days; here, there was a total loss of the thing insured, at least a technical total loss, which, for the purpose of abandonment, is equivalent to an actual total loss.

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For the defendants in error. The rights of the parties must be governed by the circumstances as they exist in fact, and not as they are supposed to exist at the time of the abandonment. A policy of insurance is a contract of indemnity, and if the assured is made good for the damage actually sustained, he has no farther claim. An abandonment may be made where there is a probability of such loss as would entitle the party to claim as for a total loss, but nothing can be asked under it, if, before the abandonment, the property is restored to the situation in which it was previous to the happening of the event on which the abandonment is founded. This is admitted to be the law in the case of a re-capture, and the reason of the rule equally applies where the property is restored by repair.

For a more full view of the grounds relied on by the counsel on both sides, the reader is referred to the case already quoted of 4 Cowen, 222.

The following opinions were delivered :

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By the CHANCELLOR. It is a well settled rule of American insurance law, that if a vessel is damaged by any of the perils insured against, so that the necessary repairs to restore her to her former state and render her sea-worthy will exceed three fourths of her value before the disaster, the owner is not bound to repair, but may abandon as for a total loss. The injury is usually spoken of as an injury to more than half her value, because, in estimating the repairs, one third of the amount is deducted, on the ground that the vessel is made more valuable by substituting new materials for old. Thus, if a ship worth \$4000 is so injured as to require \$3000 to be expended in repairs, it is estimated that the new materials used will make the vessel worth \$5000 when repaired; and deducting one third new for old, the expense of restoring the vessel to her former value will be \$2000, or one half.

There is no doubt in this case that a technical total loss had occurred, and that the assured abandoned immediately on hearing of the disaster. But the vessel being in the Isle of France, the master had caused her to be repaired, and she was actually in good safety and on her voyage before the owner and underwriters in New-York had heard of the disaster. ✓ The right to abandon depends on the state of facts at the time of the abandonment; not upon the facts which had previously existed, or on the facts which the parties then supposed to exist. ✓ (*Queen v. The Union Ins. Co.*, 2 Wash. C. C. Rep. 335. *Church v. Bedient*, 1 Caines' Cases in Error, 21.)

The question presented for our decision here is, whether the repair of the vessel, without the direction or knowledge of either party, before the abandonment was actually made, deprived the assured of the right to abandon. I cannot find that the principle of a technical total loss of the vessel, in consequence of damage to the half her value, has ever been adopted or acted on in England. We must therefore resort to the decisions of the courts of our own country on this question, and to the adjudications both here and in England in analogous cases. The precise question now under consideration does not appear to have arisen previous to this time in the courts of this state.

In *Coolidge v. The Gloucester Mar. Ins. Co.*, (15 Mass. Rep. 341,) which came before the supreme court of Massachusetts, the vessel was injured to more than half her value and repaired by the master. Two or three days before the repairs were completed, the assured not knowing of the repairs, abandoned both vessel and freight. The underwriters accepted the abandonment of the vessel and paid the loss, but refused to accept the abandonment of freight. The master, knowing nothing of the abandonment, pursued his voyage and earned the whole freight. In an action upon the freight policy, the assured were permitted to recover as for a total loss, deducting salvage. The right to recover in that case might have been sustained on different grounds from those on which it was placed by the court. But if the principles adopted in that case can be sustained, a technical total loss of a vessel, arising from damage to a moiety of her value, cannot be converted into a partial loss by a repair of the vessel by the master. Putnam, Justice, in delivering the opinion of the court, says, "To all legal purposes, after the constructive total loss, the ship repaired and rebuilt at an expense exceeding half her value must be considered a new ship; as much so, to every intent, as if the former owners and the insurers of her had procured a new keel, and had wrought up the iron and timbers which could have been obtained into a vessel of a different kind and form." I apprehend the principle cannot be sustained to this extent, as it would deprive the owner as well as the master of the right to repair in such a case. Neither the master or the owner has the right to build a new vessel at the expense of the underwriter, even with the aid of materials from the wreck of the old vessel.

The precise question now under consideration came before the circuit court of the United States for the first circuit in *Humphreys v. The Union Ins. Co.*, (3 Mason's Rep. 429.) The facts were substantially the same as in this case; and it was there decided that the repair of the vessel by the master took away the right of the owner to abandon. Judge Story puts his decision in that case on the ground that the master acted as the agent of the assured in making the repairs. The

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counsel for the plaintiff in this case contend that the master acts for the benefit of whoever it may concern, and is not to be considered the agent of the assured so as to deprive him of the right of abandonment, without his knowledge or consent. If the master is the agent of the assured in such a case, it would seem to follow that an election to repair, and the actual commencement of the operation, would deprive the owner of the right to abandon, even before the repairs were completed. But I apprehend the question whether the master is the agent of the owner or of the underwriter, depends upon the fact of a valid abandonment during the continuance of the total loss. If a valid abandonment is made, it relates back to the time of the disaster; and as to all acts of the master, done in good faith and in the discharge of his duty, he is, in that case, to be considered the agent of the underwriter. While it is doubtful whether the assured will exercise his right of abandonment or not, the lawful acts of the master cannot destroy the right to abandon on the ground that he acts as the agent of the assured. But if the master, in the exercise of his legitimate duties as the agent of whom it may concern, has converted a total into a partial loss before abandonment, the fact that the loss is no longer total takes away the right to abandon; and the result is the same if a total loss is converted into a partial one by the acts of a stranger, as in the case of recapture. While the result is doubtful, the master is not the exclusive agent of either party; but when the rights of the parties are fixed, the result ascertains whether he was the agent of the underwriters or of the assured. If the vessel is abandoned while the loss continues total, all the intermediate acts of the master are the acts of the underwriters; but if the property be restored before abandonment, the right to abandon is gone, and the acts of the master will be considered the acts of the assured.

Had the repairs in this case been made by the underwriters themselves, the assured could not have abandoned after the vessel was in safety, if the voyage had not been lost; but a mere offer to repair would not deprive him of the right. And if the master is to be considered the agent of the underwriters in making the repairs, the result is the same. Here

the assured has never been deprived of the actual possession of his vessel. There probably existed a lien upon her, in favor of the owners of the cargo, for the amount of goods which had been sold and pledged to raise money for the repairs. At the time of abandonment the vessel was in safety, and there was no incumbrance upon her that could authorize a detention which might break up the voyage. The actual damage which had been or would be sustained by the disaster, was reduced to a matter of mere computation, and was but a partial loss. The principle of adjustment adopted by the supreme court affords a fair indemnity to the owner of the ship. If he choose to be his own insurer on the freight or cargo, the underwriters are not liable for any loss he may have sustained upon either, and which is not covered by the adjustment in this case.

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In *Holdsworth v. Wise*, (1 Man. & Ry. 673,) the ship was actually lost, being abandoned by the master and crew at sea as derelict. Although she was found and saved by others at the risk of their lives, and finally arrived in port, the salvage and other expenses were more than her value; and the assured was not entitled to the possession until that amount was paid. The ship therefore continued totally lost to him at the time of abandonment.

I think the plaintiff's right to abandon for a total loss was divested by the repair of the vessel, and that the judgment of the supreme court should be affirmed.

By Mr. Senator S. ALLEN. This is an important case, and I have taken some pains to ascertain, from the limited means within my reach, the general principles which have governed in deciding questions similar to the one under consideration.

It appears to be a general rule, that the right to abandon must depend on the situation of the thing abandoned at the time the offer is made. Thus, if a vessel shall be captured, detained by embargo, or seized, and she be released or restored previous to abandonment, the right to abandon is lost by the fact of restoration, &c.

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I have not been able to discover any decision of the courts of this state embracing precisely the same state of facts as those of the case under consideration; but the principle involved in cases of capture and restoration, appears to me equally applicable to cases by shipwreck and restoration by being repaired. The ground upon which the decisions are based, as I apprehend, are, that no abandonment can be valid so long as the thing insured is not taken from the control of the owner, as it would be if the detention by capture, embargo or shipwreck existed at the time of the abandonment.

In case of capture, a restoration previous to the time of abandonment, although unknown to be assured, takes away the right to abandon. (*Church v. Bedient*, 1 Caine's Cases in Error, 21.) And upon the same principle, in the case of shipwreck, the vessel having been repaired before the abandonment and thus restored to a state which enables her to perform all that was warranted by the insurers, and although the fact was unknown by the assured, he still loses his right to recover for a total loss. This principle is clearly recognized in the case of *Humphrey v. The Union Insurance Company*, as decided by the circuit court of the United States. (Phillips on Ins. 401.) A ship upon a voyage from Messina to Boston, sustained sea damage which made it necessary to put into Lisbon, where the master had her repaired at an expense exceeding half her value as the assured alleged, and the vessel was bottomried for expense. The assured abandoned in Boston immediately on hearing of the accident, which intelligence they received about three or four days before the vessel arrived at Boston. On the arrival of the vessel she was sold under a process instituted upon the bottomry bond, and the proceeds of the ship and freight were not sufficient to satisfy the bond. A bill also had been drawn on London by the master on account of the expense of repairs, which was not paid. Mr. Justice Story held that this was a *partial* loss. He said that the assured by electing to repair, lost his right to abandon.

The cost of repairing the ship was more than half her value, and had an estimate of the expense been ordered by the captain and an abandonment determined on, instead of adopt-

ing the advice of the surveyors to repair, the assured would, in accordance with the settled law in such cases, as I view it, recover for a total loss; but, instead of this, the vessel is fully repaired and in pursuit of her voyage several days before the abandonment is determined on or made known to the underwriters.

Under the circumstances of this case it may perhaps be deemed a hardship upon the assured that he is denied the privilege of abandonment, and cases may also arise under the rule equally hard upon the underwriters; but if the courts were to attempt to shape their decisions so as to meet every case of hardship that may occur under marine risks, there might be less reason to be satisfied with the result than there will be under a general rule which, though in particular instances it may prove inconvenient, will, in the main, operate as equitably as the nature of such cases will admit.

Having arrived at the conclusion that the plaintiff in error ought to recover only for a partial loss, it is unnecessary to notice any other matter raised by the points in this cause. I am of opinion, therefore, that the judgment of the supreme court ought to be affirmed.

And this being the unanimous opinion of the court, the judgment of the supreme court was thereupon affirmed with costs.

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#### BEMUS vs. BEEKMAN.

In *replevin*, where a plea of *property* is interposed as well as a plea of *non cepit*, a verdict for the plaintiff upon the latter plea determines nothing between the parties except the taking, and the plaintiff is not entitled to recover unless the other issue be also found for him.

Where the jury found for the plaintiff on the plea of *non cepit*, but assessed no damages, and on the plea of *property*, found that it was not in the defendant, but did not find it in the plaintiff, it was held that the verdict was defective in substance, and that the court was not authorized to amend it by adding nominal damages to the finding of the jury.

Where a party to a writ of error dies after joinder in error, a judgment in error will be directed to be entered *nunc pro tunc* as of a time previous to the death.

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ERROR from the supreme court. Beekman brought an action of *replevin* against Bemus for the taking of a quantity of rye. Bemus pleaded several pleas: 1. *Non cepit*; 2. Property in himself, traversing the property in Beekman; 3. Property in one W. McIntosh, with a similar traverse; and 4. Property in himself and the plaintiff as tenants in common, with a like traverse. To the three last pleas the plaintiff replied *precludi non* because the property was in himself, concluding to the country. The *postea*, as entered on the record, shewed that the jury found as to the *first* issue, that the defendant did *take* the rye in question, the goods and chattels of the plaintiff, in manner and form, &c.; as to the *second*, that the property was not in the defendant; as to the *third*, that the property was not in W. McIntosh; and as to the *fourth*, that the property was not in the defendant and the plaintiff as tenants in common; and they assessed the damages of the plaintiff over and above costs, &c. to six cents, and for those costs, &c. to six cents. From the minutes of the clerk of the circuit where the cause was tried, and from rules granted by the supreme court, copies of which were brought up by *certiorari* on the plaintiff in error, alleging diminution, it appeared that the jury found, "On plea first, the defendant took the property; on plea second, property was not defendant's; on plea third, property was not W. McIntosh's; on plea fourth, property was not plaintiff's and defendant's jointly, and six cents costs for the plaintiff;" that on the 23d March, 1827, the supreme court denied a motion for a new trial, and on the 2d May, 1827, granted a rule in these words: "The court having decided on the argument of the case made in this cause, that the verdict rendered might be amended by adding to the finding of the jury, "*with six cents damages for the plaintiff*," ordered, on motion of W. L. F. Warren, attorney for the plaintiff, that the said verdict be, and the same is hereby accordingly amended."

Thus much appears from the record. From the opinion of the supreme court, denying a motion for new trial, (see 7 Cowen, 30,) it appears, that that court considered that the taking was fully proved; that the jury were authorized, from the proofs in the cause, to find the property in the plaintiff;

that the verdict was informally entered; that the circuit judge had permitted it to be amended by adding *six cents costs*, and as to the damages, had submitted the question to the supreme court whether to allow the amendment or not, upon which point they were of opinion that the plaintiff was entitled to recover damages for the *taking only*; that no special damage being claimed or proved, the verdict ought to have been for nominal damages; and as that was a matter of form and followed the finding of course, that the verdict might be amended by adding *six cents damages*.

The judgment was entered for *damages and costs* found by the jury, and for costs of increase. The defendant sued out a writ of error.

J. Ellsworth & B. F. Butler, for plaintiff in error. The verdict was imperfect, the jury not having answered to the whole issues committed to them, by which not only the taking was denied, but the property of the plaintiff was called in question. The jury therefore were bound to find not only the *taking* by the defendant, but *property in the plaintiff*. The taking was found, but property in the plaintiff was not found. The jury say the property was not the defendant's, nor McIntosh's, nor was it held in common by the plaintiff and defendant; but they do not say that it was the property of the plaintiff, without which he could not recover. (1 Chitty's Pl. 159, 596, 597. Co. Litt. 227, a. 5 Comyn's Dig. tit. Pleader, sect. 19, 20. Andrews, 156. Strange, 1089. 7 Bacon's Abr. tit. Verdict, M. & Z. 4 Yeates, 295. 3 Pickering, 124. 1 Archb. Pr. 213, 189. 2 id. 242. 2 Wheaton, 225. 3 Barn. & Ald. 610. Lilly's Ent. 358. 21 Viner's Abr. tit. Trial, L. f. 2. 2 Dunlap's Pr. 656. 1 Serg. & Rawle, 369. Stephen on Pleading, 188, 210, 211, 212, 219. 1 Johns. R. 380. 11 id. 196.)

The verdict being defective in point of substance, the court had no authority to amend it. (Cro. Eliz. 766. Comyn's Dig. tit. Amendment. 1 Ld. Raym. 324. 2 Str. 1052. 10 Co. R. 119. 2 Wills. 367.)

J. L. Viele, for defendant in error. The omission of the jury to find the property in the plaintiff was mere matter of

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form, and does not vitiate the judgment. They found the several matters set up by the defendant against him, passing upon each distinct plea; and though their verdict is not formally in the words of the issue, it cannot be doubted that the point in issue was determined by them. The court, therefore, had the right to put the verdict into proper form. (14 Johns. R. 86.) A writ of error will not lie for the amendment allowed by the court. (6 Cranch, 206.) But allowing the verdict to be defective, this court cannot for that cause reverse the judgment, the point not having been submitted to and passed upon by the supreme court. (*Colden v. Knickerbacker*, 2 Cowen, 31, 49.)

Butler, in reply. The plaintiff in error did apply to the supreme court, in the ordinary and usual mode, to set aside the verdict, and the question necessarily was before that court. The principle of the case of *Colden v. Knickerbacker* is, that no objection shall be urged here which the party may be deemed, by his silence, to have waived, and which, when waived, leaves the merits of the case to rest with the judgment; but it cannot preclude the party to urge an objection which goes to the very foundation of the judgment sought to be reversed, (16 Johns. R. 348.)

The following opinions were delivered :

By the CHANCELLOR. The first question presented for our consideration in this case is, whether the supreme court had a right to amend the verdict of the jury by adding nominal damages thereto. From the opinion delivered by that court, it appears no special damage was proved or claimed at the trial. If the verdict as found by the jury can be considered a general verdict for the plaintiff in the court below on all the issues, nominal damages followed of course, and the judge at the circuit ought to have directed the verdict to be so entered. Being a defect in form merely, it would be the duty of the court to mould the verdict into legal form, so as to carry into effect the intention of the jury. If the verdict is good in substance, the court may amend any defect in form. (*Diehl v. Evans*, 1 Serg. & Rawle, 367.) Where there are some counts in a

declaration which are good and others bad, and a general verdict is given on all the counts, if it appears from the judge's notes that no evidence was given on the defective counts, it is every day's practice for the court to amend the verdict so as to apply it to the good counts only. (*Eddows v. Hopkins*, Doug. R. 361. *Stafford v. Green*, 1 Johns. R. 505.) There is no doubt that the verdict in this case was defective by reason of the neglect of the jury to assess the damages; but a defect of that kind may be aided by a release. (Bentham's case, 11 Coke's R. 56.) It probably was necessary in this case to amend by adding nominal damages to enable the court to give costs, as the plaintiff is only entitled to costs where he recovers damages. (1 R. L. 343, sec. 1.)

But the plaintiff was not entitled to either damages or costs, unless all the issues were found in his favor; and if the court have added nominal damages which the finding of the jury did not warrant, the amendment was unauthorized, and their judgment should be reversed. It therefore becomes necessary to look into the verdict actually found by the jury, to see whether it was such a finding as legally entitled the plaintiff to damages.

In examining this question, I lay out of view what is stated in the *postea* as to the property of the plaintiff. It is evident those words were added to the verdict on the first issue by the plaintiff's attorney, and without authority. If the finding of the jury is in favor of the plaintiff generally, as it was in this case on the first issue, his attorney has a right to put into the *postea* every thing necessary in point of form to make the verdict complete: but he has no right to add any thing which was not in fact found by the jury, and which could not have been legally enquired into on that issue. If he does, it is mere surplusage, and cannot aid a defective finding on other issues. Under the issue of *non cepit*, the taking of the property is alone in question. (*M'Farland v. Barker*, 1 Mass. R. 152.) And if the verdict on that issue is found for the defendant, he is not entitled to a return of the property. If the defendant means to contest the plaintiff's right to the property, he must deny it directly by a special plea or by a formal traverse, as was done by the three last pleas in this case.

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Where a defendant in replevin pleads property in himself, with a formal traverse as to the plaintiff's right to the property, the allegation that it belongs to the defendant is called the inducement to the traverse, and issue cannot be taken on that allegation. (*Lady Chichesley v. Thomson*, Cro. Car. 104.) It is but a substitute for an avowry to obtain a return of the property. The replications in this case very properly took issue upon the only allegation in the special pleas which was traversable. The question presented for the jury to determine on all those issues was, whether the property replevied was the property of the plaintiff. The jury have found that the property did not belong to the defendant, or to M'Intosh, or the plaintiff and defendant jointly. But does it necessarily follow from this that it belonged to the plaintiff? This finding may be true, and yet the title might be in some person other than the plaintiff. And a verdict which finds the matter in issue only by argument and inference, is void. (5 Com. Dig. tit. Pleader L. 22.)

As this court have not the facts before them on which the jury found their verdict, it is impossible to say they intended to find that the property belonged to the plaintiff. Even if the evidence was set forth in the record and was sufficient to entitle the plaintiff to a verdict on all the issues, it is at least doubtful whether either the supreme court or this court could amend the verdict as to a matter of fact, which is of vital importance in the cause. Although the supreme court thought there was sufficient to authorize the jury to find property in the plaintiff, it is evident from the opinion which has been sent up here, that their attention was not directed to the fact that the jury had not so found. It appears the judge at the circuit thought otherwise; and the defendant's counsel neglected to give evidence on that point, in consequence of an intimation from him that evidence on his part was unnecessary. The supreme court decided that the defendant was not precluded by the intimation of the judge from giving further evidence if his counsel considered it necessary. On this point the decision of the supreme court was technically correct. But as the defendant lost the benefit of his further testimony because his counsel deferred to the opinion of the cir-

cuit judge, I think he is justified in availing himself of all legal objections to the verdict for the purpose of obtaining a new trial.

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The conclusion to which I have arrived is, that the verdict of the jury was defective in substance, and did not entitle the plaintiff to even nominal damages. I am therefore of opinion that the adding of damages by way of amendment was unauthorized, and that a *venire de novo* should have been awarded. (*Hicks v. Keats*, 6 Dow. & Ry. 68.) I think the judgment of the supreme court should be reversed with costs, and that a *venire de novo* should be awarded by that court. And as one of the parties has died since the joinder in error here, the judgment of this court should be entered *nunc pro tunc* as of the term or session of this court previous to his death. (*Green v. Watson*, 6 Wheaton, 260.)

By Mr. Senator BENTON. This court are called upon for its judgment upon the validity of the verdict in this case, and whether the same be amendable; the supreme court upon the argument of the case there having directed an amendment to be made, allowing the words "with six cents damages for the plaintiff" to be added to the verdict.

The plea of *non cepit*, in replevin, admits the property of the thing taken to be in the plaintiff in the action; and if the defendant means to dispute the question of property he must plead it specially; he will not be allowed to disprove the ownership under an issue which only denies the taking. (2 Phillips' Ev. 126. 1 Chitty's Pl. 159.) These authorities are unquestionable, and appear to me to establish clearly the materiality of the issue upon the second plea. In the case of *Harrison v. McIntosh*, (1 Johns. R. 384,) it was held that a "plea of property in a stranger was a good plea either in abatement or in bar, and entitled the party to a return without an avowry," and this for a good reason; a plaintiff has no right to retain the possession of property illegally taken from another by a replevin.

This court cannot determine what the jury were authorised to find, from the evidence given on the trial, nor is

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it material that this inquiry should be made here; if the verdict as delivered is for the plaintiff below on all the issues, the judgment must be affirmed.

Upon the issue on the second plea the jury found that the "property was not the defendant's:" but this, I apprehend, is not a sufficient finding by the jury that the "property was the plaintiff's;" the verdict may be true in point of fact and still it does not establish the right of the party to recover, because a stranger might be entitled to it. The authorities cited in Bacon's Abr. are numerous, and the rule deduced from them is, that "verdicts which do not find all that is in issue, or which vary from the issue, are in general bad;" and in 1 Archb. 189, it is said, "a verdict must comprehend the whole issue or issues submitted to the jury in the particular cause; otherwise the judgment founded on it may be reversed." Again, "a verdict is void which finds the matter so imperfectly that there does not appear a good title for the plaintiff." "It must find so much of the issue as maintains or avoids the bar."

In applying the doctrine contained in these authorities to the case under consideration, I do not perceive upon what grounds this verdict is to be sustained. All the issues most clearly are not found, and the verdict is variant. What title can be adjudged to the party by this finding? We can say that the defendant below has not title to the property in dispute, because the jury have so declared: but can judgment be pronounced upon a fact not found? The defendant in the court below is not entitled to judgment upon the verdict because the plea in bar is not maintained; and as the bar seems not to be avoided, neither party are entitled to judgment upon the verdict. I cannot perceive the difference between a verdict which does not find the whole of a single issue, but only a part, and one which does not find all of the several issues where it is necessary they should be found, to entitle a plaintiff to a judgment.

The case of *Miller v. Trets*, (1 Ld. Raym. 324,) was a case in error to the exchequer chamber in England. The verdict, which was the matter complained of, did not comprehend the whole issue, a part of the facts denied by the plea were not found, and it was held bad and the judgment

reversed, although preceding the proceedings in error an application was made for leave to amend. Upon what principle of law can courts assume to give judgment for a party in a cause, where an issue or issues have been joined without a proper verdict? A later case than those above referred to has arisen, in which the law upon the point presented by this case has been considered and elaborately discussed. The language of the decision in *Patterson v. The United States*, (2 Wheaton, 225,) is, that "the rule of law is precise. A verdict is bad if it varies *from* the issue in a substantial matter, or if it find only a part of that which is in issue. The reason of the rule is obvious, and results from the nature and end of pleading. It is the duty of the jury to decide the very point in issue." And the court in which this determination was had, in discussing the question then under consideration, proceed to remark farther: "It is true, that if the jury find the issue and something more, the latter part of the finding will be rejected as surplusage; but this rule does not apply to a case where the facts found in the verdict are substantially variant from those which are in issue." It may here be observed that the facts in the two cases are not precisely alike, but I apprehend they are enough so to make the reasoning, recognizing as it does the long established maxims of the common law, peculiarly applicable in this instance. It would seem not to be necessary to pursue the subject in relation to this part of the case any farther; and if I have not mistaken the character and effect of the finding of the jury, the verdict not only varies from the issue in a substantial matter, but in fact it finds only a part of that which is in issue. The issue under the second plea is a material and substantial issue, and, in my opinion, is not found by the verdict.

The supreme court, in the case of *Thompson v. Button*, (14 Johns. R. 86,) put the decision of the question raised for determination expressly upon the ground that the intention of the jury could not be mistaken, from the fact that they found the defendant guilty upon the general issue, which the court assumed would not have been done if he had made out a justification according to the avowry. There are cases in the

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books in which the court have corrected the form of the verdict in respect to second and subsequent issues, which have become immaterial in consequence of the jury having found substantially and formally other issues in the cause; but this never has been, and could not be done where the issue, not found at all or defectively found, would determine the rights of the parties. A verdict for the plaintiff upon the plea of *non cepit*, determines no question between the parties where a plea of property is interposed, except the taking, and this results from the peculiar character of this action and the situation of the parties. Assuming that the verdict was defective and bad, it follows the court had no power over it, nor any right to allow the amendment. In this view of the case, and upon an examination of all the cases having any bearing upon the preliminary question interposed by the counsel for the defendant in error, I do not perceive that the objection taken can be sustained. From the language of the opinion and the amendment allowed, I think it fairly inferible that the second point was raised and discussed in the supreme court. Entertaining no doubts upon the question presented in this cause, I am of opinion that the verdict is bad and not amendable, and the judgment thereon erroneous, and that it should be reversed with directions to the court below to award a *venire de novo*.

And this being the unanimous opinion of the court, the judgment of the supreme court was thereupon reversed with costs, and a *venire de novo* was directed to be awarded.

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See DEMAND, 1, 2.

AMENDMENT.

1. Where a verdict is found for an amount exceeding the damages claimed in the declaration, the plaintiff will not be permitted to

amend his declaration by increasing the damages, unless he abandons his verdict, pays the defendant's costs of the trial and of resisting the motion, and consents to a new trial. *Dox v. Dey*, 356

2. Amendments will not be granted to enable a party to set up the defence of usury or of the statute of limitations, if he has not availed himself of the opportunity to interpose such defence in the first instance. It seems, however, that where such defences are defectively set forth, an amendment will be allowed to give the party the benefit of the defence which he intended to present, but he will not be permitted to put in a new or additional plea or answer. *Beach v. Fulton Bank*, in error, 573

APPEAL BONDS.

A mis-recital of the day of the rendition of a justice's judgment in an appeal bond is fatal. *The People v. Monroe C. P.* 426

See JUSTICES' COURTS, 9.

ARREST.

1. An arrest of a felon may be justified by any person without warrant, whether there be time to obtain one or not, if a felony has in fact been committed by the person arrested. *Holly v. Mix*, 350
2. If an innocent person is arrested upon suspicion by a private individual, such individual is excused if a felony was in fact committed, and there was reasonable ground to suspect the person arrested. *id*
3. But if no felony be committed by any one, and a private individual arrest without warrant, such arrest is illegal; an officer, however, would be justified if he acted upon information from another which he had reason to rely on. *id*
4. A constable may *ex officio* and without warrant arrest a breaker of the peace, and bring him before a justice. It seems, however, that this should be done within a reasonable time after the affray. *Taylor v. Strong*, 384

ASSAULT AND BATTERY.

1. Infants are liable in the same manner as adults for trespass and assault. *Bullock v. Babcock*, 391
2. Where the injury is not the effect of an unavoidable accident, the person by whom it is inflicted is liable to respond in damages to the sufferer. *id*

3. It seems, that an injury might probably be considered an unavoidable accident in the case of infants, which would not be so considered in the case of adults. *id*

ASSIGNMENT UNDER FOREIGN BANKRUPT ACT.

1. An assignee under a foreign commission of bankruptcy is not entitled before judgment to an injunction to restrain the bankrupt from receiving from the custom house here property which was on the high seas on board a vessel, on its way from England to New-York, at the time of the suing out of the commission. Per curiam. *Abraham v. Plestoro*, on appeal, 533
2. An assignment under the bankrupt law of England does not operate a legal transfer of the personal property of the bankrupt in this country, even as between the assignee and the bankrupt. Per MAYNARD, OLIVER and STEBBINS, senators. *id*
3. If the property be on board a British vessel on the high seas at the time of the suing out of the commission, and thus within the jurisdiction of England, it passes by the assignment; but if so, the fact must be distinctly averred, and will not be presumed. Per MAYNARD and STEBBINS, senators. *id*
4. The assent of a bankrupt to a statutory assignment of his property is not to be presumed while the proceedings are yet in *feri*. Per MAYNARD and OLIVER, senators. *id*
5. If the same effect be given to a statutory assignment as to a voluntary conveyance, the assignee is not entitled to an injunction before judgment. Per OLIVER, senator. *id*

ASSUMPSIT.

1. Money paid by mistake. *Franklin Bank v. Raymond*, 69
2. Where there is an agreement to demise a house for five years, and leases to be executed, under which the party enters, and subsequently refuses to accept a lease, the owner may maintain assumpsit for the use and occupation. *Little v. Martin*, 219
3. Taking the key of the house without a continued actual occupation, is enough to entitle the plaintiff to sustain the action. *id*
4. The plaintiff is not bound to sue upon the agreement, and the statute of frauds cannot be objected to a recovery, as the suit is not on the contract. *id*

5. Where A. agreed to furnish a certain number of bales of cotton towards completing the cargo of a vessel bound to a foreign port, principally freighted by B. on B. paying him the full price of the cotton; the shipment, however, to be made one half on account of A. and the remaining half on account of B., and on returns of sales coming to hand, A. to receive his share of the profits, or to pay his share of the loss, and the cotton was shipped by B. to his consignees abroad, it was held, that an action for money paid would not lie, A. being liable only in an action on the special agreement for a loss, if any sustained, in the sale of the cotton, and not for the total amount of the advance on his account. *Peltier v. Sewall*. 269

6. Such agreement did not create a partnership; the parties were tenants in common in the article shipped. *id*

7. Where a promissory note made to be discounted at a bank, for the accommodation and benefit of an individual, signed by him and by three other persons as his sureties, is refused to be discounted by the bank, unless further names are procured, and another person is procured by the principal to put his name to the note, when it is discounted, and such person is subsequently compelled to pay a part of it, he cannot recover for money paid in a joint action against the principal and the three persons who originally signed as sureties, although he expressly signed the note as surety; he will be considered as a co-surety, unless a state of facts is shewn from which it appears positively, or by legal intendment, that those who originally signed intended, as to the subsequent signer, to stand in the character of principals. *Warner v. Price and others*, 397

8. The admission by one of the original sureties, that the plaintiff signed as surety for all the makers of the note, will not bind his co-sureties; no partnership being shewn to exist between them. *id*

9. Money erroneously paid by one party to another in mutual ignorance of facts which, if known, would have prevented the payment, may be recovered back in an action of assumpsit. *Burr v. Veeder*. 412

ATTORNEYS.

By the "act to prevent abuses in the practice of the law," (*Statutes*, vol. 4, 278, c.) attorneys and counsellors at law are prohibited from the purchase or receiving of any promissory note, &c. except in payment for estate real, or personal sold, for services rendered,

or for the purpose of making remittance, although such note, &c. be not purchased for collection, or for the purpose of bringing a suit thereon. The Revised Statutes, (vol. 1, p. 288.) makes the offence to consist in the purchase, with the intent of bringing a suit thereon, thus changing the law from what it was when the offences charged in this case were committed. *The people v. Walbridge*, 120

See CLERKSHIP.

B

BANKRUPT ACT OF FOREIGN STATE.

See ASSIGNMENT, 1, 2, 3, 4, 5.

BANKS.

1. In an action by the receivers of a bank, appointed under the act to prevent fraudulent bankruptcies, &c. to recover the amount of a note discounted at the bank, falling due after the appointment of the receivers, bank notes of the same bank of which the defendant became the holder, previous to his note falling due, cannot be set off against the demand of the plaintiffs, although, on the day his note falls due, the defendant makes a tender of the same in payment of his note. *Haztun and Brace v. Bishop*, 13
2. Receivers are trustees not for the bank, but for the creditors of the bank. Their appointment, and the possession of a note by them, is a transfer or assignment of the note for the benefit of all the creditors; consequently, bank notes holden by a debtor of the bank, whose note has not fallen due, cannot be set off against a note thus transferred before maturity. Even had the note of the debtor been due when transferred, and payment had not been made or tendered before the transfer, a set off would not have been allowed. *id*
3. An assignment of its property by a bank, after it has stopped payment, to persons other than officers or stockholders, in trust to apply the proceeds to the payment of all the creditors of the bank, in equal proportions, is a valid instrument, and not void under the provisions of the act to prevent fraudulent bankruptcies; and bank notes of the same bank, purchased by the debtor after such assignment, cannot be set off in an action against him. *id*
4. An action on a promissory note endorsed in blank, belonging to a bank, may be sued by receivers or assignees, in their proper names, as endorsees, without specifying their character as receivers or assignees. *id*

5. In a proceeding against a bank by the attorney general under the "act to prevent fraudulent bankruptcies by incorporated companies, and to facilitate proceedings against them," if, in the bill filed by way of information, facts and circumstances are stated, verified by affidavit expressing belief in the truth of those facts, and they are of such a character as to raise a fair presumption that the bank proceeded against is insolvent, and are not contradicted or explained by the bank, on a motion for the appointment of a receiver after due notice, the fact of insolvency will be considered as proved within the meaning of the act. *Bank of Columbia v. Attorney General*, 588
6. A receiver may be appointed by the chancellor in the first instance, without a previous reference to and appointment by a master. *id*
7. The amount of the security to be given by the receiver rests in the discretion of the chancellor. *id*
8. A direction by the chancellor to a master not to take a nomination of any person as receiver who was an officer or agent of the bank proceeded against at the time it stopped payment or at any time within six months previous thereto, is discreet and proper. *id*
9. The act of the legislature under which these proceedings are had is a valid and not an unconstitutional law as it respects incorporations granted previous to its passage. *id*
See DEMAND, 1, 2.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A demand of payment within three or four weeks after the transfer of a note, overdue when transferred, and notice of non-payment within two or three months after such demand, it seems, is sufficient to charge the endorser, where, from the facts of the case, it is manifest that an immediate demand and notice was not contemplated. *Van Hoesen v. Van Alstyne*, 75
2. The sufficiency of notice of non-payment to an endorser, when the facts are conceded, is a question of law to be decided by the court and not by the jury. *id*
3. An action brought against the maker of a promissory note on the third day of grace is prematurely brought, and advantage may be taken of the error on the trial by nonsuiting the plaintiff. *Osborn v. Moncure*, 170
4. The maker has the whole of the third day of grace in which to make payment, though it seems that notice to the endorser on the third day of grace, after demand and default of payment by the maker, would be good. *id*
5. A protest of a bill of exchange by a huissier (an officer of a tribunal of commerce in France authorised by the commercial code of that country to make protests,) will not be received in evidence without proof of the code. *Chanoine v. Fowler*, 173
6. The commercial code of France, being written law, cannot be proved by the production of a printed book, admitted to be conformable to the official edition of the code, published by the government. *id*
7. It seems that the same faith and credit would not be given to the protests of an officer unknown to the law merchant, that is given to the acts of a notary public, although the acts of such officer are in strict conformity to the laws of the country in which he resides, and such laws are duly proved; evidence beyond the production of the bill and protest would be required to shew the authenticity of the act. *id*
8. Notice of the non-acceptance of a bill of exchange cannot be given by a stranger; it must be by a party to it, or by one who, on the bill being returned to him, would have a right of action upon it. *id*
9. Where information of the dishonor of a bill of exchange is sent to an agent who is not a party to the bill either actually or nominally for the purpose of collection, with a request to give notice to the drawers, and he omits to give such notice until the next day after receiving such information, the drawers are discharged; being a mere agent, he should have given immediate notice. *Sevall v. Russell*, 276
10. Where the existence and amount, and loss or destruction of promissory notes is shewn, and it does not appear affirmatively that the notes were negotiable, the plaintiff is entitled to recover on the lost notes. *McNair v. Gilbert*, 344
11. Notice to an endorser of the non-payment of a note sent to the place where he resided at the time of the discount of the note is sufficient to charge him, although intermediate that time and the maturity of the note he has changed his place of abode. *Bank of Utica v. Phillips*, 408
12. Inquiry as to the residence of an endorser is not necessary, where the holder has

reason to believe that he knows his place of abode. *id*

13. Endorsers of a note made in the name of a firm by a member thereof without the assent of his co-partner, and passed by him for his individual debt, are not liable for its payment. *Williams v. Walbridge*, 415

14. The burden of proof lies with the holder to shew that the several members of a firm assented to a note, in the name of a firm, where such note is taken for the private debt of one of the partners. *id*

15. The defence that the note of a firm has been given by one partner for his individual debt, without the assent of his copartner, is admissible under the general issue. *id*

16. The maker of such note is a competent witness to prove the defence. *id*

17. The drawers of a note cannot object that it was negotiated contrary to its terms, where they themselves put it into circulation. *Wardell v. Hughes*, 418

18. Where in a notice of non-payment dated on the day that a draft falls due, it is stated that the draft was protested on the evening before, for non-payment, and that the holders look to the endorser for payment, it is right and proper to submit the question to a jury, whether or not the defendant has been misled. A draft falling due on Sunday may be demanded on the preceding day. *Ontario Bank v. Petrie*, 456

19. In an action against the drawers of a bill of exchange, dishonored by the drawees, but accepted by third persons *supra protest* for the honor of the drawers, payment must be demanded of the drawees, and notice of non-payment given. *Scofield v. Bayard*, 488

20. Where a bill was payable in London, but by mistake was sent from Birmingham, where the holders resided, to Liverpool, to be presented for payment, and the mistake was discovered and attempted to be cured by sending the bill to London, where it did not arrive until two days after its maturity, but would have arrived in season but for the oversight or negligence of the clerks of the post office in Liverpool, it was held that such mistake or negligence was not a sufficient excuse for not presenting the bill on the day it fell due. *id*

21. It seems, that where there is an impossibility to present the bill on the day it falls due, owing to unavoidable accidents, and

the holder is not in fault for the delay, a subsequent presentment will be good. *id*

See ASSUMPSIT, 6, 7. DECLARATION, 1. EVIDENCE, 7, 8. INSURANCE COMPANIES, 1, 2.

BILL OF PARTICULARS.

1. A variance between a bill of particulars and the evidence produced will not be regarded, unless the bill was calculated to mislead. *McNair v. Gilbert*, 344

2. An order for a bill of particulars may be made at any time before the trial. When made after issue joined, it should be granted with caution. *Andrews v. Cleveland*, 437

BOND.

A bond executed by nine persons as obligors upon certain terms and conditions, and subsequently delivered by five of the obligors, without the knowledge or consent of the remaining four, upon terms and conditions different from those originally stipulated, is not obligatory upon the latter. *Lovett v. Adams*, 380

See COUNTY TREASURER, 1.

C

CASE.

1. The directors of a monied institution are responsible, in an action on the case, for improperly obtaining and disposing of the funds or property of the company. *Franklin Fire Ins. Co. v. Jenkins*, 130

2. They are liable, however, only individually and severally, and not jointly as directors, unless the act complained of be done by a majority of the board of directors, when by the act of incorporation of the company, a majority only is competent to the transaction of the business of the company. *id*

3. When a board of directors consists of sixteen, a joint action against four of the number for an act done as directors cannot be maintained. *id*

4. A general charge in a declaration, that the defendants, as directors of an insurance company, loaned the funds of the company upon inadequate security, knowing such security to be insufficient, without any specification of time, persons or circumstances, is insufficient; and a demurrer for this cause will be sustained. *id*

5. The declaration will also be adjudged bad, if the grievances complained of are alleged

to have been committed in part by the want of care and attention, and in part by the corrupt and wilful mismanagement of the defendants, *id*

6. *It seems*, that in a declaration, charging directors with having squandered the funds of a monied institution, it should be averred of what the funds, credits and effects of the company consisted. *id*

7. Where, in consequence of the want of ordinary care and skill in laying the foundations of a house, about to be erected, damage was sustained by the owner of an adjoining house and the parties thereupon entered into an agreement, by which it was stipulated that the work should proceed, that a partition wall should be built for the benefit of both parties, and that the damages and compensation should be passed upon by arbitrators; which submission was revoked previous to an award made, and an action for breach of covenant brought by the person who built the house to recover a compensation for a portion of the wall, in which action the defendant set off his damages, it was held, that such damages were a legitimate subject of consideration in such action of covenant, under the agreement between the parties, and having been submitted to and passed upon by a jury, a suit could not subsequently be sustained for a recovery of the same damages. *Skelding v. Whitney*, 154

8. *It seems*, that where a defence has been insisted on in a former action, submitted to and passed upon by a jury, and not objected to by the plaintiff in such action, although such defence be not the subject of set off in such action, a party will be precluded from subsequently maintaining an action for the subject matter thus set off by way of defence. *id*

See LANDLORD AND TENANT, 1, 2.

CERTIORARI.

1. A certiorari to remove an indictment, directed to the oyer and terminer, will not be quashed, because, at the time of the allowance of the writ, the indictment is in the sessions, if, when the writ be served, the indictment be in the oyer and terminer. *The People v. Jewett*, 314

2. A certiorari will not lie to a justice of the peace to bring up the proceedings had under the Revised Statutes concerning encroachments on highways. *Pugsley v. Anderson*, 468

3. In a proceeding of that kind, the justice can-

not pass upon the qualifications of the persons returned as jurors. *id*

CHALLENGE.

1. A challenge to the array will not be allowed on the ground that in the selection of grand jurors, all persons belonging to a particular fraternity or association were excluded, if those who are returned are unexceptionable, and possess the qualifications required by statute. *The People v. Jewett*, 314

2. It is good cause of exception to a grand juror that he has formed and expressed an opinion as to the guilt of a party whose case probably will be presented to the consideration of the grand inquest; so also a grand juror's having evinced feelings of hostility towards such party is good cause of exception. But these exceptions must be taken before the indictment is found, and will not afterwards be heard. *id*

CHANCERY.

1. An answer in chancery, responsive to and fully denying a material allegation in a bill, will prevail, unless it be disproved by more than one witness. *Stafford v. Bryan, on appeal*, 532

2. The re-examination of a witness in chancery rests in discretion, and though granted under peculiar circumstances is against the ordinary practice of that court. *Beach v. Fulton Bank, on appeal*, 573

3. A general denial of fraud in an answer to a bill of discovery is not enough, where, in addition to a general charge of a fraudulent concealment of property by a defendant, there is a specific charge that such property is held by others in secret trust or by colorable title for the benefit of the defendant; the specific charge must be responded to, or the answer will be held insufficient. *Petit v. Candler, on appeal*, 618

4. A conveyance of an estate will not be decreed in chancery where the proof of the equitable title varies from that set up in the bill; thus, where a state of facts was alleged in a bill creating a resulting trust, and the proof showed a subsequent agreement to convey, it was held, that the party was not entitled to relief. *Forsyth v. Clark, on appeal*, 637

5. The appropriation of the joint funds of a co-partnership by one of the members of a firm to the purchase of real estate conveyed to such partner in his own name will not create a resulting trust in favor of his

- co-partner, unless the funds were so appropriated in pursuance of an agreement between the parties at the time of the purchase. *id*
6. Where the contracting parties, after a contract for the purchase of an estate and the payment of the consideration money, but before the executions of a deed, conspire together to defraud the creditors of the vendee, it seems a court of chancery, on a bill filed by a creditor, would deem the equitable title vested in the vendee, and would not permit the statute of frauds to be interposed as a bar to the setting up of such title. *id*
7. Where the property of a defendant, sold under execution, brings a sum equal to or greater than the amount of the judgment, the plaintiff in such judgment can no longer be considered a judgment creditor of such defendant, entitled to the equitable interference of a court of chancery, to set aside a fraudulent settlement of accounts between the defendant and a third person. *id*
8. To enable a court of chancery to set aside as fraudulent a settlement between a defendant in a judgment and a third person, and to order an account, &c. such settlement must be directly charged to have been fraudulent; and all the creditors in such case should be made parties, or an offer made in the bill for them to come in. *id*
9. An answer in chancery, although responsive to a bill, if impeached in material parts by the proofs in the cause, is, like all other evidence entitled to only diminished credit. *id*

See USURY, 5. WILL, 4.

CLERKSHIP.

The order for allowance for classical studies to clerks of attornies must be obtained at the commencement of the term of clerkship. If omitted, a judge's order should be obtained in vacation. *Anon.* 456

COMMON CARRIERS,

1. In an action against six, as proprietors of a steam-boat, in which they were charged as common carriers, for the loss of property put on board for transportation, and the gravamen was stated to have arisen from a breach of duty, it was held, that a plea in abatement that there were 54 other proprietors, who were jointly liable, was bad, and judgment of respondeas ouster was awarded. *Bank of Orange v. Brown,* 158

2. An action solely upon the custom, is an action of tort, in which all or any number of the owners of a vessel, coach or any kind of conveyance used by common carriers may be sued, and on a verdict against all or a part only of those against whom the action is brought judgment may be rendered. *id*
3. The plaintiff has his choice of remedies, either to bring assumpsit or case; but when one or the other form of action is adopted, it will be governed by its own rules. If the plaintiff states the custom, and also relies on an undertaking, general or special, the action, though it may be said to be *ex delicto quasi ex contractu*, is in reality founded on the contract, and will be treated as such. *id*

COMMONS, THROWING UP LAND TO.

See FENCES, 1 to 8.

CONDITION.

1. Where there is a condition of re-entry reserved in a lease for non-payment of rent, the reversioner is not entitled to re-enter without shewing a compliance with the requirements of the common law, such as a demand, &c. or that by statute he is entitled to re-enter, for the want of sufficient property on the premises countervailing the rent. *Jackson, ex dem. Livingstons v. Kipp,* 230
2. A sale under an execution does not entitle the reversioner to demand a fifth of the consideration money under a covenant, that on every sale or assignment such proportion of the purchase money shall be paid to him, if it be bona fide an adversary proceeding on the part of the creditor, and not collusive with intent to defeat the condition in the lease. *id*

CONSOLIDATION OF ACTIONS.

1. A consolidation rule will be granted where several actions are pending between the same parties brought at the same time, the causes of action in which may be comprised in the same declaration. *Brewster v. Stewart,* 441

2. A defence on the merits need not be set up to entitle a defendant to the benefit of the rule. *id*

CONSTRUCTION OF WRITTEN INSTRUMENTS.

See DEED, 1, 2, 3, 4, 5. LANDLORD AND TENANT, 3. MORTGAGE, 1. SALE OF CHATTELS, 1 to 4. SURETY, 1. WILL, 1, 2.

CONTRACTS.

1. Agreements are independent where, on the one hand, an article of merchandise is sold and agreed to be delivered on demand, and on the other payment is deferred until five months after the date of the contract. An action in such case may be maintained for the non-delivery of the article, although not demanded until after the time stipulated for the payment of the money; and performance on the part of the plaintiff need not be averred. *Dox v. Dey*, 356

2. The non-payment of the whole consideration is no excuse for the non-performance of a contract, where a part is received unless it clearly appears that the payment of the whole consideration was a condition precedent. *id*

CORPORATION.

A corporation may be proved by an exemplification of the act of incorporation and acts of user under it. *Utica Ins. Co. v. Cadwell*, 296

COSTS.

1. A party resisting a mandamus in this court by requiring the relators to plead or demur, and subsequently joining in demurrer, is liable to the costs of the demurrer, on judgment being rendered in favor of the relators. *The People, ex rel. Hale v. Onondaga C. P.* 304

2. Where a plaintiff pays costs to a defendant for not proceeding to trial at a circuit court pursuant to notice, he cannot afterwards charge the defendant with the plaintiff's costs of that circuit, though he subsequently obtains a verdict. *Linacre v. Lush*, 305

3. No fee whatever is allowed to a commissioner for an order staying proceedings. *Williams v. King*, 311

4. A plaintiff is entitled to charge for engrossing on the *nisi prius* roll a notice of special matter subjoined to the defendant's plea; but not for engrossing the same on the judgment roll. *Platt v. Walworth*, 311

5. Where money is paid into court after issue joined, and the plaintiff proceeds in the suit, but fails to establish his demand beyond the amount paid in, the defendant is entitled to the costs of the defence incurred subsequent to the payment of the money into court, but not to the costs previously accrued. *Aikins v. Colton*, 326

6. In an action of false imprisonment against four defendants, where one of them is, on the

trial of the cause, acquitted by verdict, he is entitled to recover costs against the plaintiff, although he joined in pleading with one of the other defendants against whom a verdict is rendered. *Griswold v. Sedgwick*, 326

7. So judgment having been rendered on demurrer in favor of the defendant who was acquitted at the trial, and of another against whom a verdict was found on the plea of not guilty, the plea put in by them going to the whole declaration having been adjudged good, it was held that such two defendants were entitled to their full costs of the trial as well as of the demurrer; a single bill of costs, however, being allowed to both such defendants. *id*

8. In an action of slander of title the plaintiff is entitled to full costs, though the recovery be less than \$50. *Goodrich v. Stewart*, 439

See PRACTICE, 2.

COUNTY TREASURER.

1. A bond given by a treasurer of a county that he "shall well, truly and faithfully execute and perform the duties of treasurer of said county according to law," is good, although not in the form prescribed by statute. *Allegany, Supervisors of, v. Van Campen*, 48

2. If the variance were material, it seems it could not be taken advantage of by plea. *id*

3. To a breach assigned that a treasurer of a county had wrongfully and fraudulently embezzled the public money and converted it to his own use, a plea that the treasurer had not been requested by the supervisors, or by any person authorized to make such request, to pay over the money, is not good; a defendant in such case having no right to require that a demand should be made previous to suit. *id*

4. A plea that a treasurer was not requested before suit brought to pay over the monies in his hands, in answer to a breach that he refused to pay, although particularly requested so to do, is bad if it concludes with a verification. *id*

5. The addition to such plea that the treasurer had not been called upon to account, is bad also for duplicity. *id*

D

DECLARATION.

1. In declaring on a note as the endorsee of a firm, it is not necessary to set forth the

- names of the members of the firm. *Cochran v. Scott*, 229
2. A declaration is bad for misjoinder of counts, where, in an action of assumpsit against an administrator, a count of *insimul computas*, sent with the defendant, as administrator, of and concerning monies from the defendant as administrator, to the plaintiff, before that time due and owing, is joined to counts on promises made by the intestate. *Reynolds v. Reynolds*, 244
 3. Had the accounting been stated to have been with the defendant, as administrator, of and concerning money due and owing to the plaintiff, by the intestate in his life time, there would have been no misjoinder. *id*
 4. In declaring in assumpsit for the breach of a contract, it is not necessary to set forth the payment of a part of the consideration, admitted by the contract to have been received. *Dox v. Dey*, 356
 5. Nor where the contract is to deliver on demand, is it necessary to allege the precise day of the demand; the day not being material. *id*
 6. A contract in the alternative to transport fifteen or twenty tons of marble from one place to another must be stated in the declaration according to the terms of it. If stated as an absolute contract for the transportation of twenty tons, and not fifteen or twenty tons, the variance will be fatal. *Stone v. Knowlton*, 374
 7. So, to allege a consideration for the promise in addition to the true considerations moving thereto, not supported by the proof, will be cause of nonsuit. *id*
- See CASE, 4, 5, 6. INSOLVENTS, 4. SLANDER, 1, 2, 7.
- ### DEED.
1. Where a deed of a tract of land to three grantees recites a will devising the same land to one of the grantees during widowhood, and the remainder in fee to the others; declares its object to be to carry into effect the intention of the testator; and then grants the premises to the three persons in fee, "*Habendum* to them, their heirs and assigns, in the manner mentioned in the said will," the *habendum* is not inconsistent with, and will control the premises. *Jackson, ex dem. Bird v. Ireland*, 59
 2. Although the testator, at the time of the making of the will, had no legal estate in the premises, the grantees in the deed, and those claiming under them, are estopped from setting up any title inconsistent with that conveyed thereby. *id*
 3. Where a mother conveyed a house and lot to two sons in fee, and took back an instrument in writing of the same date, executed by one of the grantees under seal, declaring the intention of the parties to be, that the grantor should hold and enjoy the property, and receive the rents and profits thereof during her natural life, and covenanting to abide by such agreement, it was held, that the deed and the instrument were parts of the same contract, and that the grantor had an estate for life in the premises. *Jackson, ex dem. Watson v. M'Kenny*, 233
 4. The deed being founded on a pecuniary consideration, might take effect *in futuro*; and the defeasance being a part of the deed, and not a distinct instrument, the deed was valid and effectual as a covenant to stand seised to uses. *id*
 5. The instrument also might operate by way of exception or reservation in favor of the grantor. *id*
 6. Where a party owns land adjoining one side of a stream, and also owns the bed of the stream, and conveys to another owning land adjoining the stream on the other side thereof the land under water to the middle of the stream, reserving to himself the right to butt a dam on both sides or shores of the stream as he shall think necessary, the parties are entitled to an equal participation in the use of the water, notwithstanding the reservation. *Case v. Haight, on appeal*, 632
 7. The reservation in such case has not the effect of an exception, it being indispensable to a good exception that the thing excepted should be part of the thing granted, and not of any other thing; the reservation, however, is operative as an implied covenant or by way of estoppel, securing the right provided for in the reservation. *id*
- ### DEMAND.
1. In an action on a bank note payable on demand generally and not at a particular place a demand of payment is not necessary before the commencement of a suit. *Hartun and Brace v. Bishop*, 13
 2. Nor is a demand necessary on a note payable on demand at a particular place; but if, in such case, the defendant shews that he was ready at the place to make payment, and brings the money into court, he discharges himself from interest and costs. *id*
- See COUNTY TREASURER, 3

DEMURRER.

A demurrer to a declaration contained several counts will not be sustained if either count be good. *Cochran v. Scott*, 229

DISCHARGE.

Effect of discharge of debtor from the limits of gaol by creditor. *Poucher v. Holly*, 184

DOWER.

1. A writ of dower *unde nihil habet* lies only against the tenant of the freehold. *Hurd v. Grant*, 340

2. Where the demandant failed in shewing that the defendant was such tenant, and where it was proved on the part of the defendant that another was tenant of the freehold, the court refused to set aside a nonsuit. *id*

E

EJECTMENT.

1. A conveyance in fee having been shewn from the original proprietor of a tract of land, the grantees will be presumed to have entered into possession; and whoever is in possession will be presumed to hold for them, and in subordination to their title, until the contrary appears. So ruled, in a case where the claim to recover was made under a conveyance executed 55 years before suit brought. *Doe, ex dem. Marston v. Butler*, 149

2. A demise in a declaration of ejectment laid from a man who was dead at the commencement of the suit, may be objected to at the trial and is cause of nonsuit. A lessor must be capable of making a demise, not only at the time alleged in the declaration, but also when the suit is commenced. *id*

3. Where a joint demise is laid in the names of several lessors, it must be proved as laid; and unless it be shewn that the lessors had such an interest as would enable them to join in a demise, the plaintiff will be nonsuited. *id*

4. Where a person entered into the possession of land belonging to his father-in-law, who promised to give the land to him and his wife, and subsequently by will devised the same to the wife, it was held in an action of ejectment brought by the heirs of the wife, that a possession of 36 years continuance under a conveyance from the husband was not adverse, and that a conveyance to the husband from the ancestor could not be presumed. *Jackson v. French*, 337

5. Notice to quit not necessary where there is no tenancy in fact, and especially where the defendant disclaims to hold as tenant. *id*

6. Where a jury would not be warranted by the evidence in an action under the statute for waste, to find a verdict for the plaintiff, a judge is not authorised, in an action of ejectment founded on an alleged forfeiture for waste, to instruct a jury that the acts complained of simply because done without the permission of the landlord, work a forfeiture of the tenant's right: he should submit the question to the jury to determine whether the acts done were in fact prejudicial to the plaintiff's interest. *Jackson v. Tibbits*, 341

7. It seems, that if waste be committed in a dwelling house, part of the property demised, only such parts of the dwelling house are forfeited as the waste is committed in. *id*

8. In ejectment, where the tenant after suit brought offers to surrender the premises, to pay the costs, and to enter into a stipulation as to mesne profits, giving the plaintiff the same rights as if judgment was entered against the casual ejector, the court will stay proceedings. *Jackson v. Stiles*, 429

9. A rule to appear and plead in ejectment will be ordered where the service of the declaration is on the wife of the defendant on the premises. *Jackson v. Salisbury*, 430

ERROR.

1. It is error in a court of common pleas to refuse to decide questions of law pertinent to a case on trial, upon which a decision is asked by one of the parties. *Van Hoesen v. Van Alstyne*, 75

2. Where a court of common pleas refuse to exercise a discretion vested in them by law, under the impression that they possess not the power which they are called upon to exercise, and in consequence a judgment is erroneously obtained, such judgment will be reversed for error. *Beach v. Chamberlain*, 366

3. It is irregular for a sheriff and jury, on executing writs of inquiry, to hear evidence in several causes before they retire to make up their inquiries. Such irregularity may be waived by the assent of parties; if not waived, the remedy is not by writ of error, but by motion to set aside the proceedings. *Van Wagenen v. McDonald*, 478

4. Where a party to a writ of error dies after joinder in error, a judgment in error will be directed to be entered *nunc pro tunc* as of a time previous to the death. *Bemus v. Beekman*, 667
5. If a verdict in a former suit will stand on the assumption that the issue therein was found in favor of the title set up in the second suit, such verdict and the judgment thereon are not conclusive. *id*

ESCAPE.

1. A bond for the limits, given by a defendant who had been charged in execution, and to whom the plaintiff had previously given permission to go at large, beyond the jail liberties does not revive the judgment, so that an action can be maintained against the sheriff for an escape. *Poucher v. Holley*, 184
2. Although it was not the intention of the plaintiff to discharge the debt, a voluntary discharge by a creditor of his debtor from the limits discharges the judgment and the debt. *id*
6. Nor does it help a defendant in an action of ejectment that the title set up by the lessor was in dispute in the former action, if such title came in question only collaterally, and if it does not appear that the verdict is necessarily based upon the finding that the lessors had no title. That the jury found against the lessor must appear affirmatively and not rest in inference *id*
7. Proof of hand writing of the endorser of a note, going no farther than that the witness believed it to be the hand writing of the endorser, founded upon the facts of having seen him write his name two months before the trial, and also having seen him write five years before the trial, stating at the same time that he would not have been able to have testified to the hand writing from the fact alone of having seen him write five years ago, and expressing doubts as to a part of the signature, would scarcely be sufficient to uphold a verdict, if the question as to its sufficiency had been properly submitted to a jury. *Utica Ins. Co. v. Badger*, 102

EVIDENCE.

1. A record, verdict or judgment is not conclusive when offered as evidence to prove an issue of fact, and not brought forward by plea as an estoppel. The jury in such case may find against the facts so proved, if the other evidence in the case will warrant their so doing. *Jackson, ex dem. Genet v. Wood*, 27
2. To make a record evidence to conclude any matter, it should appear from the record itself that that matter was in issue; and evidence cannot be admitted that under such a record any particular matter came in question. *id*
3. An estoppel cannot be created by parol evidence helping out a record; to constitute an estoppel by a former judgment, the precise point which is to create the estoppel must have been put in issue and decided, and that it was so put in issue and decided can appear by the record alone. *id*
4. The lessors of the plaintiff in an action of ejectment are not barred from their action by the production of a record of a verdict and judgment in a suit against the lessors and others as heirs and devisees, in which they pleaded *riens per descent*, and on the trial of which issue the question was whether the premises claimed in the action of ejectment and other lands held by the lessors and their co-defendants in that suit came to such defendants by descent or devise, and were assets in their hands to pay the debts of their ancestor, although the jury on the issue of *riens per descent* founded against the defendants, it not appearing from the record that the fact in issue in the action of ejectment was in issue and decided in the former suit. *id*
8. Where a judge upon such evidence, in an action by the endorsees of a promissory note, charged the jury that the plaintiffs were entitled to a verdict, instead of leaving it to them under proper instructions, to say whether the endorsement was or was not the hand writing of the party, a new trial was granted. *id*
9. A witness on his examination may recur to a written memorandum to refresh his memory as to facts to which he is called to testify. *Holladay v. Marsh*, 142
10. Where deeds of lands embrace premises lying in two counties, and are recorded in only one of them, and it is proved that the originals are lost, exemplifications of the records of the deeds are competent evidence to prove the contents of such deeds, in an action of ejectment for the recovery of the premises conveyed, situate in the county where the deeds are not recorded. *Jackson, ex dem. Montresor v. Rice*, 180
11. The bare fact of two persons holding different parcels of what was once an undivided tract of land, deriving title from the same source, constitutes no privity of estate so that the testimony of a deceased witness on the trial of an action of ejectment against one, for the premises in his possession

- sion, can be given in evidence in an action of ejectment against the other for the premises possessed by him, although both actions be by the same claimant. *Jackson, ex dem. Barton v. Crissey*, 251
12. A discharge under the act abolishing imprisonment for debt in certain cases, may be given in evidence under the plea of a general issue; and a variance between the discharge pleaded and that produced on the trial will not prevent the party from offering the discharge in evidence. *Bradley v. Field*, 272
13. Reasonable notice must be given to produce books or papers before the time when the cause may be tried: What shall be deemed reasonable notice depends upon the circumstances of the case. Whether secondary evidence shall be admitted depends upon the discretion of the judge. *Utica Ins. Co. v. Cadwell*, 296
14. The privilege of not disclosing a communication made by a client to counsel is confined to counsel and to an interpreter, though it seems the rule might perhaps be extended to the clerks of counsel. *Jackson v. French*, 337
15. But a person in no way connected with the counsel, present at a communication made to him by a client is bound to testify. *id*
16. A promissory note for the payment of money void in law, so that a suit cannot be maintained upon it, may be used nevertheless as evidence of an acknowledgment of indebtedness to take a case out of the statute of limitations. *Utica Ins. Co. v. Kip*, 369
17. The defendant has a right to avail himself of the testimony of special bail by substituting and justifying new bail. *Leggett v. Boyd*, 376
- See CHANCERY, 9. SALE OF CHATTELS, 5, 6, 7, 10. SLANDER, 3, 8.

EXECUTIONS.

1. A plaintiff issuing an execution, and directing an amount less than the whole sum to which he is entitled to be levied, cannot subsequently issue another execution for the balance. *The People v. Onondaga C. P.* 331
2. To constitute a levy under an execution, the officer should enter upon the premises where the goods of the defendant are, and take actual possession of them. The goods should be brought within his view, and subjected to his control; and it seems that an inventory should be taken of them. He should assert his title to them by virtue of the execution, and his acts should be public, open and unequivocal, and nothing should be done by him to cast concealment over the transaction. *It seems*, that the acts of the sheriff, as to the asserting of his rights and the divesting of the possession of the defendant, should be of such a character as would subject him to an action as a trespasser but for the protection of the execution. *Beekman v. Lansing*, 446
3. In an action of debt on bond conditioned for the payment of an annuity, after judgment, it is not necessary to have a *scire facias* to warrant an execution for subsequent arrears. An execution may be sued out without a *scire facias*, but it seems it would be well to specify in the direction particularly, the arrears claimed. *Wood v. Wood*, 454
- See LANDLORD AND TENANT, 6, 7.

EXECUTORS AND ADMINISTRATORS.

1. After an administratrix has pleaded the general issue and a plea of *plene administravit* prater a certain sum, and the plaintiff in the action has replied admitting the truth of the second plea, praying judgment, &c. a plea *puis darrein continuance*, setting forth a judgment confessed by the administratrix in a suit commenced since the action in which the plea is interposed was at issue and noticed for trial, will be received and considered good. *Lawrence v. Bush*, 305
2. An administrator cannot retain money remaining in his hands unadministered, to apply on a contract for the sale of land to the intestate, where the contract has been annulled and cancelled by the vendors. He cannot thus benefit the heirs seeking an enforcement of the contract, at the expense of the creditors of the intestate. *Harmon v. Durham*, 367
3. An executor, by virtue of his office, becomes a trustee for the devisees and creditors of the testator, when it is ascertained that the personal property of the estate is insufficient to pay the debts of the testator; and in such case it will not be permitted that he sell the real estate of the testator under a judgment held by himself and become the purchaser. *Rogers and Rogers, on appeal*, 503
- See DECLARATION, 2, 3.

F

FALSE IMPRISONMENT.

1. False imprisonment will lie against an officer and a complainant in a criminal process

uction, where they combine and extort money from a party accused by operating upon his fears although the party be in the custody of the officer, under a valid warrant, issued upon a charge of felony. *Holley v. Mix*, 350

2. In an action for false imprisonment against two, where several damages are given, the plaintiff may cure the irregularity by entering a *nolle prosequi* against one, and taking judgment against the other. *id*

FENCES.

1. Where there has been a division fence between the owners of adjoining lands, and one of them, after giving due notice of his intention to throw up his lands for common feeding, or to let them lay open, removes his part of the fence, and his cattle enter upon the lands of his neighbour, the owner of such cattle is liable to an action of trespass at the suit of his neighbour, notwithstanding that the fence was not removed until after the time specified in the statute. *Holladay v. Marsh*, 142
2. A notice of an intention to throw up lands or to let them lay open may be by parol. *id*
3. A party who has received such notice cannot object that other persons in possession of adjoining lands have not received a similar notice. *id*
4. The only effect of throwing up land, or permitting it to lay open, is to remit the parties to their common law rights and duties, which are, that a tenant of a close is not obliged to fence against an adjoining close, and without such fence may bring trespass for an entry of cattle; the owner of the cattle being obliged to keep them on his own premises, in the absence of an agreement or prescription about fences. *id*
5. Where cattle are rightfully feeding upon commons, either such as belong to the town or such as are thrown up to common feeding, under the seventeenth section of the act, the owner of crops is bound to make fences against such cattle, or he cannot maintain trespass. *id*
6. Cattle can be thus rightfully feeding, only in pursuance of a regulation adopted in town meeting. *id*
7. Whether that part of the seventeenth section which speaks of throwing up land to common feeding, does not relate only to such towns as have common lands in their corporate capacity? *Quere.* *id*

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8. It seems that the twelfth section of the act relative to the duties and privileges of towns authorising prudential rules and regulations respecting the permitting or preventing cattle to go at large, has reference to such towns only as have common lands, the property of the town in its corporate capacity; and that a town having no common lands in its corporate capacity has not the power to pass such regulations, the public not having the right to depasture highways. *id*

FOREIGN BANKRUPT ACT.

See ASSIGNMENT, 1, 2, 3, 4, 5.

FRAUD.

1. Actual fraud in the conveyance of property may be shewn by a creditor, although his debt accrued subsequent to the conveyance sought to be avoided. *Wadsworth v. Havens*, 411
2. So a purchaser for valuable consideration has a right to avoid a precedent fraudulent conveyance. *id*
3. Where a nephew, a simple, ignorant young man, was induced by his uncle, an advocate (*par courtoisie*) in justices' courts, to accept a conveyance of land worth not to exceed \$240 in satisfaction of a claim of at least \$500, it was held, on an appeal from chancery, that from the nature of the transaction, the inadequacy of the consideration, the relative character, capacity and connection of the parties, fraud and imposition might well be presumed; and a decree directing the payment of the original claim by the uncle, and a re-conveyance of the land by the nephew, was affirmed. *Hall v. Perkins, on appeal*, 626

See CHANCERY, 6, 7, 8.

FRAUDS, STATUTE OF.

See ASSUMPSIT, 1, 2, 3.

H

HIGHWAYS.

See CERTIORARI, 2.

I

IMMORALITY, ACT FOR SUPPRESSING OF.

A justice of the peace, &c. under the act of 1824, in amendment of the "act for suppressing immorality," has a right, upon his

own personal view of offences committed against that act, to order an offender into the custody of a constable for safe keeping (without issuing a warrant) until the offender can be tried. *Farrell v. Warren*, 253

INCORPORATED CITIES AND VILLAGES.

Under an ordinance of the corporation of New-York, directing the filing up, altering or amending a public slip, the assessment should be made under the 269th section of the act relative to that city; and property in the vicinity belonging to the corporation is equally liable to assessment as the property of individuals, notwithstanding that the statute directs that one third of the expense of the improvement shall be borne by the corporation. *Ross v. Corporation of N. Y.* 333

See **STREETS**, 1, 2.

INCORPORATED COMPANIES.

Proceedings against them under the act to prevent fraudulent bankruptcies by incorporated companies, and to facilitate proceedings against them. *Haztun and Brace v. Bishop*. 13

See **BANKS**, 1, 2, 3, 4, 5, 6, 7, 8, 9. **DEMAND**, 1, 2. **CASE**, 1 to 6. **INSURANCE COMPANIES**, 4, 5, 6.

INDICTMENT.

Where there are two counts in an indictment for a misdemeanor, one good and the other bad, and the defendant is convicted, the indictment will not be quashed on demurrer, nor the judgment arrested or reversed for that cause. *Kane v. The People*, 363

See **PRACTICE**, 9, 10, 11.

INFANCY AND INFANTS.

1. Infancy is admitted by a replication of a new promise to a plea of infancy, and need not be proved by the defendant. *Goodsell v. Myers*, 479
2. The ratification of an infant's contract should be a promise to a party in interest or his agent or at least an explicit admission of an existing liability, from which a promise may be implied. *id*
3. The ratification should be equivalent to a new contract. *id*
4. The note of an infant is voidable not void,

and may be affirmed after the infant comes of age. So held in a case where the action was on a negotiable note. *id*

See **ASSAULT AND BATTERY**, 1, 2, 3. **MINOR**.

INJUNCTION.

Where there is an unlawful diversion of a stream of water from the mills and hydraulic works of a party, it is a proper case for the allowance of a preliminary injunction, as the injury, if persisted in, might be irreparable. *Case v. Haight, on appeal*, 632

See **ATTACHMENT**, 1, 5.

INSOLVENTS AND INSOLVENT DISCHARGE.

1. An action cannot be maintained against the maker of a promissory note payable to bearer by a person to whom the same has been transferred, where the maker has obtained a discharge from all his debts as an insolvent debtor, previous to the transfer; although after the discharge, but before the transfer, the maker makes a new promise to the payee to pay the debt, and such new promise is set up by way of replication to the plea of discharge. *Deputy v. Stuart*, 135
2. An insolvent's discharge under the act exonerating a debtor from the payment of his debt, discharges the debt for which a note is given; the note becomes *functus officio*, loses its negotiable qualities, and a person to whom it is transferred after such discharge acquires no right to maintain an action upon it. *id*
3. A promise to pay a debt discharged under such insolvent law is a new contract. A suit on such contract can be brought only in the name of the person with whom the contract is made; and a note, the evidence of the original debt, has no connection with such suit, other than as furnishing a consideration for the new promise. *id*
4. In declaring in an action brought after such new contract, the plaintiff may set forth the original cause of action, and in his replication aver the new promise. *id*
5. In a plea of a discharge of an insolvent debtor under the ninth section of the act for giving relief in cases of insolvency, the fact that the insolvent was indebted to the creditor on whose application the proceedings were had in a sum not less than \$25, must be expressly averred, or the plea is bad on general demurrer. *Wheeler v. Townsend*, 247

6. The recital of the fact in the discharge set forth in the plea will not supply the defect in the averments giving jurisdiction to the officer. *id*
7. An averment in a plea of an insolvent discharge, that the defendant was "of the county," to a judge of which he presented his petition for a discharge, is sufficient to give the judge jurisdiction. *Porter v. Miller*, 328
8. The moral obligation resting upon a debtor who has obtained an insolvent's discharge, is a good consideration for a subsequent promise to pay a debt. *McNair v. Gilbert*, 344
9. A promise to a petitioning creditor is equally valid as to an opposing creditor. *id*
10. The omission by an insolvent to state the cause or consideration of his indebtedness to his creditors, vitiates his discharge. *id*
See EVIDENCE, 12.

INSURANCE.

1. Where a policy of insurance was effected upon goods and merchandises laden or to be laden on board a ship for and during the term of six calendar months, without reference to any particular voyage, the risk to commence from and immediately following the loading of the goods on board of the vessel, it was held, that a trading voyage was evidently contemplated by the parties; that the policy was to be construed in the same manner as if a trading voyage had been expressed, with liberty to touch and trade at such ports and places on the globe as the insured should choose, subject to the accustomed and usual mode of transacting business at the several places visited by the vessel; and that however often the goods might be changed the policy would attach. *Coggeshall v. American Ins. Co.* 283
2. If goods, whilst in the transportation from the shore to a ship engaged in a trading voyage, are lost, the insurer is liable, if the means employed for such transportation are according to the known course of trade and established usage of the place where the goods are thus attempted to be laden on board the vessel. *id*
3. It seems that it is not an established point, in this country, that the insurer would be discharged by the insured taking the goods in his own lighter for the purpose of landing them, if the goods are lost. *id*
4. Underwriters may contract so as to incur risks antecedent to the date of the policy. *id*
5. Where a vessel insured against the perils of the sea on a voyage from the East Indies to Holland was greatly damaged, and put in to the Isle of France, from whence advice was sent to New-York to the assured, who forthwith abandoned the vessel to the underwriters there as for a total loss, giving notice on the sixth day of July, and in the mean time the master had caused the vessel to be repaired, so that on the twenty-eighth day of June she sailed from the Isle of France, being tight, staunch and strong, bound to a port in Holland, where she subsequently arrived in safety, it was held, although a technical total loss had originally occurred, that the plaintiff was not entitled to recover as for such loss, but could recover only for a partial loss. *Dickey v. American Ins. Co.* 658
6. If a master of a vessel, in the exercise of his legitimate duties as the agent of whom it may concern, converts a total into a partial loss before abandonment, the fact that the loss is no longer total takes away the right to abandon; and the result is the same where a total loss is converted into a partial loss by the acts of a stranger. *id*
7. If the vessel is abandoned while the loss continues total, all the intermediate acts of the master are the acts of the underwriters; but if the property be restored before abandonment, the right to abandon is gone, and the acts of the master will be considered the acts of the assured. *id*
8. While it is doubtful whether the assured will or will not exercise his right of abandonment the acts of the master cannot destroy the right to abandon. *id*
9. Where repairs are made by the underwriters or by the master as their agent, and the voyage is not lost and the vessel arrives in safety, the assured cannot abandon. *id*
10. It is a well settled rule of American insurance law, that if a vessel is damaged by any of the perils insured against, so that the necessary repairs to restore her to her former state and render her sea-worthy will exceed three fourths of her value before the disaster, the owner is not bound to repair, but may abandon as for a total loss. This is usually called an injury to more than half her value because one third of the expense of repair is deducted, new for old. *id*

INSURANCE COMPANIES.

1. An insurance company may make a valid promissory note, which will be held good

until the contrary be shewn. *Barker v. Mechanic Fire Ins. Co.* 94

2. A note by which J. F. as president of an insurance company, promises to pay a sum certain, is not the note of the company, but of the maker alone. *id*

3. The Utica Insurance Company have a right to invest their surplus funds in loans. But having called in a part of their capital for the express purpose of making loans in a particular way, viz. by the issuing of checks in the shape of bank notes, it was held, that loans thus made are in violation of the restraining act, and that a note taken upon such loan is void. *Utica Ins. Co. v. Cadwell*, 296

4. The money lent may however be recovered under the common count, and checks drawn received as money, and duly paid, will be considered money. The recovery however in such case, being on the contract as distinguished from the security, an action cannot be sustained against the borrower and his sureties, the sureties not being parties to the contract. *id*

5. An insurance company, authorised to take and hold securities bona fide pledged to them to secure the payment of debts contracted with them, cannot loan money on the hypothecation of stock and the taking of a note as collateral security for the payment of the loan; when, by the act of their incorporation they are prohibited from discounting notes. *The North River Ins. Co. v. Lawrence*, 482

6. Where a power to loan money in a particular mode is given to a corporation, all other modes are necessarily excluded, and all securities other than those allowed to be taken by the act of incorporation are void. *id*

7. A contract for the loan of money made with an incorporated company, as well as the security taken on such loan, is void, if the power to loan money is not expressly given, or necessarily incident to the powers granted to such company by its charter. *Beach v. Fulton Bank*, 573

INTEREST.

1. In assessing the damages for the breach of a contract, the jury may allow interest by way of damages. *Dox v. Dey*, 356

2. Interest may in all cases be collected by action of debt on judgment; and where the judgment is rendered on contract, it may be collected by directing its levy upon execution. *Sayre v. Austin*, 496

J

JUDGMENTS.

1. A suit cannot be maintained here, on a judgment obtained in a justice's court in a sister state, unless the statute organizing such court be shewn; if, on the statute being proved, it appears that the subject matter of the suit was within the jurisdiction of the court, and that the proceedings were had in conformity to the statute, the judgment will be entitled to full faith and credit. *Thomas v. Robinson*, 267

2. The priority to which a judgment in favor of the United States is entitled does not extend to create a prior lien on real estate; it merely gives a right of prior payment out of the general funds of the debtor in the hands of the assignee. *Forsyth v. Clark, on appeal*, 637

See CHANCERY, 7. EXECUTORS AND ADMINISTRATORS, 1.

JUSTICE OF THE PEACE.

1. Power under the act for suppressing immorality. *Farrel v. Warren*, 253

2. A justice of the peace has no right to deny an adjournment because a defendant refuses to pay his fees for drawing a bond on the defendant's demanding an adjournment. If he for such a cause, refuses an adjournment, he is liable to an indictment for a misdemeanor. *The People v. Calhoun*, 420

See CERTIORARI, 2.

JURORS.

See CHALLENGE, 1, 2.

JUSTICES' COURTS.

1. A demurrer may be interposed to pleadings in justices' courts, in which case the pleadings must be tested by the rules governing in other courts. *Van Hoesen v. Van Alstyne*, 75

2. The specifications of the items for which a judgment is confessed, under the sixth and seventh sections of the "act to extend the jurisdiction of justices of the peace," as well as the oath, must be in writing. *German v. Swartwout*, 282

3. A constable, however, sued for neglecting to return an execution issued on such judgment, and his sureties cannot avail themselves of an omission to comply with the requirements of the statute in these particulars. *id*

4. Under the justices' act of 1824, the oath of the party applying for a warrant is proof within the meaning of the statute, whereon the necessity and propriety of issuing a warrant may be determined. *Bissell v. Hills*, 389
5. It seems that under the Revised Statutes the affidavit of the party applying for a warrant would be held sufficient. *id*
6. A justice's execution may be against the goods and person of the party against whom it issues, in the same process, in cases where the party is subject to imprisonment. *Taylor v. Fuller*, 403
7. The oath necessary to enable a party recovering to demand an execution within 30 or 90 days, as the case may be, must be made forthwith, while the parties are still before the justice; so that the party liable to execution may give the security contemplated by the act. *id*
8. An oath is not necessary to justify the issuing of an execution, where the party liable to execution is neither a freeholder nor has a family. *id*
9. A declaration in a justice's court, where the plaintiff declares on a book account generally and at the same time exhibits a written account of items, is good; and on appeal, evidence should be received that the account thus exhibited was returned by the justice and filed with his return, although it was not attached to the return. *Stolp v. Van Cortland*, 492
3. Where a tenant took a lease of a village lot for 21 years, and covenanted to pay all taxes, charges and impositions which should be imposed upon the demised premises; and during the term, the premises were subjected to an assessment for pitching and paving a street, under an act incorporating the village and authorising such assessment, passed subsequent to the date of the demise; it was held, that by the terms of the covenant, the tenant was liable to pay the assessment, although the expenditure was for a permanent benefit, extending beyond the term. *Bleecker v. Ballou*, 263
4. Where a sheriff received an execution, and went with it in his pocket to the house of the defendant, but took no inventory and did not act to enforce the execution for eleven months afterwards, not even apprising the defendant of the fact, it was held that no such levy had been made as would debar the landlord of the house occupied by the defendant from claiming the rent due to him, although it accrued subsequent to the pretended levy. *Beekman v. Lansing*, 446
5. Notice to the sheriff of rent due to the landlord is not necessary previous to the removal of the goods from the demised premises; if given even after a sale, so that it be before the money is paid over to the plaintiff in the execution, it is good. *id*
6. Where it is a condition in a lease of personal property that the lessee shall keep it upon particular premises and not remove if therefrom, a removal of such property by the lessee operates as a forfeiture of the term, and divests his title so that no interest in the property removed remains in him that can be sold by execution. *Otis v. Wood*, 498
7. If property thus circumstanced is levied on and sold under an execution against the lessee, the lessor is entitled to maintain an action of trover against the officer. *id*

See TRESPASS, 1.

L

LANDLORD AND TENANT.

1. In an action on the case by a tenant against his landlord, for distraining for a greater sum than is due for rent, where the tenant, to regain possession of his goods, gives a negotiable note, with sureties, for the sum claimed, if entitled to recover at all, the tenant is not entitled to recover, as damages, the difference between the rent due and the sum distrained for, if the note is not actually paid, and remains in the hands of the landlord. *Lewis v. Lozee*, 79
2. A negotiable note, with sureties, taken by a landlord from his tenant, after a distress, for the amount claimed as rent, payable in 60 days, under an agreement to relinquish the distress, and not to re-enter or distrain within 60 days, is a collateral security only, and not a payment or satisfaction of the rent; it appearing affirmatively that the note has not been paid or negotiated by the landlord. *id*
1. Where the maker of a note against which the statute of limitations had run, on its

See ASSUMPSIT, 1, 2, 3. CONDITION, 1, 2.

LEVY.

See EXECUTIONS, 2.

LIMITATIONS, STATUTE OF.

1. Where the maker of a note against which the statute of limitations had run, on its

being presented to him for payment, said that the note had been paid in services performed for the payee; that the services were not done to apply on the note, but there was a running account between him and the payee and he intended the amount should be set off against the note or against the payee, and agreed to produce his account, but at a subsequent day it was burnt; it was held, that those declarations did not amount to an admission of a subsisting indebtedness, without which a promise could not be implied. *Bradley v. Field*, 272

2. The acknowledgment of a defendant to take a case out of the operation of the statute of limitations, must be an unequivocal and positive recognition of a subsisting claim in favor of the plaintiff; it must be an admission of a previous subsisting debt which he is liable and willing to pay; and must not be accompanied by circumstances repelling the presumption of a promise to pay the debt. *Purdy v. Austin*, 187

3. Where a defendant on an account being presented to him after looking at it, throw it down in a passion and said, "I owe him (the plaintiff) no such money," or asked, "I owe him so much money as that? Why did he not present the bill himself?" and added that he never had a bill from him, that he would not settle with any one but him, that he did not owe him any thing, or any thing worth mentioning; that he had paid him a great deal of money, a horse, and the use of a house and appeared much surprised and signified that he had paid the plaintiff all his work amounted to, (the account being for work alleged to be done;) it was held, that the declarations of the defendant, instead of amounting to a recognition of a subsisting demand, were a denial of the pretended claim of the plaintiff. *id*

4. A plaintiff cannot avail himself of a *capias* issued to save the statute of limitations, although the same was regularly returned, entered on a continuance roll, and the continuances carried down to the time of the issuing of the process on which the defendant was arrested, unless he shews that the process on which the arrest was made is a continuation of the process originally issued, as that it is an *alias* or *pluries*, &c. The continuation of the suit must be proved, and will not be presumed. *Soulden v. Van Rensselaer*, 472

5. Where a plea of *non assumpsit infra sex annos* was put in, instead of a plea of *actio non accrevit infra*, &c. and the plaintiffs replied a new promise, and gave evidence in support of the replication on the trial of the

cause, the issue, though informal, was held not to be immaterial, and that the defect was cured by the verdict. *id*

6. A debt, barred by the statute of limitations in the life time of the testator, is presumed to be paid by him, and is therefore not a legal demand or a just debt. An executor has no right to retain for such a demand due to him personally, notwithstanding a provision in the will for the payment of all just debts, and that even in a case of parent and child. *Rogers v. Rogers, on appeal*, 503

7. An acknowledgment which is to have the effect of taking a stale demand out of the operation of the statute of limitations, ought to be clear and explicit in relation to the subject or demand to which it refers. *Stafford v. Bryan, on appeal*, 532

8. If effect can be given to the declarations or admissions which may be proved to have been made by a defendant without referring them to the demand upon which the suit is brought they will not be considered as referring to such demand, and as evidence of a new promise to pay it; and especially will they not be so considered where the defendant, in an answer to a bill of discovery, denies under oath that he has ever acknowledged or promised to pay the demand. *id*

IV

MANDAMUS.

See Costs, 1.

MEDICAL SOCIETIES.

An initiation fee may be demanded from physicians and surgeons on becoming members of county medical societies. *The People v. N. Y. Medical Society*, 426

MILITIA LAW.

A written memorandum made by a captain of a company of horse-artillery, of an application to him by a member of his company, to enrol his horse for service, is a sufficient enrolment under the militia law to exempt such horse from seizure on execution. It is not necessary an entry should be made on the roll of the company. *Shields v. Craney*, 274

MINOR.

A minor is incapable of holding a civil office within this state; but it belongs not to the officer whose duty it is to administer the

oath of office to refuse to administer such oath. *The People v. Dean*, 438

MOHAWK TURNPIKE CO.

1. The president and directors of the Mohawk Turnpike Company are personally liable to punishment as for a misdemeanor for every neglect to keep the road in good repair. The offence being personal, is punishable by fine and imprisonment, and the judgment is not that the road be repaired. *Kane v. The People*, 363
2. The offence is joint and several; wherefore some may be acquitted and others convicted. *id*
3. It seems, that the endeavor of any director in the board of directors to obtain an order for the repair of the road would entitle such director to an acquittal. *id*

MORTGAGE.

1. A conveyance of land, accompanied by another instrument shewing the conveyance to have been intended as a security in the nature of a mortgage, though absolute in its terms, will be considered as a mortgage; and not being registered or recorded will be adjudged inoperative and void as against a subsequent bona fide purchaser for a valuable consideration without notice. *Brown v. Dean*, 208
2. Money paid by the holder of a mortgage to redeem mortgaged premises from a sale for taxes, is a charge upon the land, and may be demanded upon foreclosure of the mortgage. *Burr v. Veeder*, 412

MORTGAGE OF PERSONAL PROPERTY.

Where a mortgage of personal property was executed by a brewer of his stock on hand and the utensils of his trade, and it appeared that he was embarrassed with debts at the date of the mortgage, that the transaction was kept secret from those in his employment, that he not only continued in the possession of the property, but used and disposed of it as absolute owner, it was held, that a verdict of a jury finding against the bona fides of the transaction was right, and the court affirmed a judgment entered on such verdict, although the charge to the jury on the trial of the cause was objectionable. *McLachlin v. Wright*, 348

N

NEW TRIAL.

A new trial will be granted for the misdirection

of the judge, although the evidence may have warranted the verdict found, where the chances are equal that the verdict resulted from the mis-direction. *Wardell v. Hughes*, 418

See EVIDENCE, 7, 8.

O

OVERSEERS OF THE POOR.

See POOR, 1 to 7.

P

PARTIES.

See CASE, 3. INSOLVENTS, 1, 2, 3.

PARTITION.

See PRACTICE, 12.

PERPETUATING TESTIMONY.

To authorise the production of a deposition in evidence, taken under the act to perpetuate testimony, the party must produce proof of the inability of the witness to attend at the circuit, and not rely on the presumption of such inability arising from the advanced age of the witness. *Jackson, ex dem. Montresor v. Rice*, 180

PLEAS AND PLEADING.

1. The plea of *nil debit* to an action of debt on recognizance of bail is bad on general demurrer. *Niblo v. Clark*, 24
2. A licence or permission by a plaintiff to a defendant to depart this state, and an agreement that all proceedings on the judgment against him shall be stayed until his return, may be plead in bar to an action against the bail, on the recognizance. *id*
3. The second section of the act, "for the more easy pleading in certain suits," allows any matter to be given in evidence, which, if specially pleaded, would be a defence to the action; but not matter which would be no defence, though specially pleaded. *Van Steenberg v. Bigelow*, 42
4. Where, in a contract relative to the transportation of merchandise on the canal, the dangers of canal navigation are excepted out of a warranty for delivery by a specific time, a plea generally alleging such dangers, without specifying them, as an excuse for non-performance, is not sufficient on special demurrer. *Woodworth v. McBride*, 227

5. Whatever is necessarily understood, intended, and implied in a plea is traversable, as much as if it were expressly alleged. Thus, where to a plea of two suits pending for the same cause of action, the plaintiff replied that at the time of the commencement of the suit in which the plea was interposed there was not another suit pending for the same cause of action, the replication was held to be good. *Haight v. Holley*, 258

6. A replication to a plea of *riens per descent* in a *scire facias* against heirs, *quare executionem non*, that the heir had lands, &c. is good, without particularizing the lands descended, &c. *Sharp v. Sharp*, 278

See COUNTY TREASURER, 2, 3, 4, 5. EXECUTORS AND ADMINISTRATORS, 2. INSOLVENTS, 5, 6, 7. PUIS DARREIN, 1.

POOR.

1. Paupers must be supported since the 27th November, 1824, by the county in which they happened to be on that day although previous to the passage of the act of the legislature of that date, the legal settlement of such paupers was in another and different county. *Palmer v. Overseers of Coxesackie*, 193

2. Where a pauper belonging to one county was, on the 27th November, 1824, residing with an individual of another county, who supported him under a contract with the overseers of the poor of the town bound to provide for him, and such contract was rescinded on the 5th March, 1825, leaving the pauper still residing with such person, who continued to support him until February, 1827, and then brought an action against the successors of the overseers of the poor, with whom the contract was originally made, it was held, that the action would not lie, there being no promise either express or implied to pay for the support of the pauper. *id*

3. It seems that, under the provisions of the act of 1824, the town in which such pauper happened to be on the day of the passage of the act would have no right of action against the town where the former settlement of such pauper was. *id*

4. An order of a justice of the peace, authorizing an annual allowance for the relief of a pauper, is authority sufficient to an overseer to contract for the support of such pauper. A formal adjudication of the settlement of the pauper in such case is not necessary. *id*

5. Overseer of the poor may make contracts within the scope of their authority, which are

binding upon them in their official capacity, and upon their successors in office; which successors are liable to be sued for a non-performance of the contracts of their predecessors. *id*

6. It seems, that an order of a justice, authorizing the expenditure for which a recovery is sought, is not necessary to the maintenance of an action against an overseer upon an express promise. *id*

7. A contract for the support of a pauper for an indefinite time may be rescinded by the overseers; and where no objection is made as to the particular time of its termination, it may be put an end to at any time. *id*

PRACTICE.

1. A *ca. sa.* with a term intervening between its teste and return, is irregular. *Gibbons v. Larcom*, 303

2. Where a plaintiff in an action of assumpsit recovers a sum not carrying costs, and the defendant is entitled to costs, the defendant in the first instance cannot make up the record of judgment. His course is, to have his costs taxed, and to require of the plaintiff to insert the same in the record, or, if the record be already made up and filed, to enter a suggestion on it, stating the taxation of the costs, and the amount thereof. *Fobes v. Meigs*, 308

3. It is irregular to serve a copy of an affidavit on which a motion is to be founded, previous to its being sworn to. *Wilson v. Tiffany*, 310

4. Where a party excepts at the circuit, if the bill of exceptions is not sealed at the trial, he must prepare his bill and serve a copy within two days after the trial on the opposite party, who has four days to propose amendments, &c. as in the settlement of cases. *McGregor v. Cleveland*, 312

5. A second *feri facias* cannot issue, until after the return of a previous execution. *Cumpton v. Field*, 352

6. A rule ordering the prosecution of a sheriff's bond, given on being served with an attachment, will not be granted until the *quarto die post* the return. *Anon.* 423

7. Notice of a rule to amend a pleading, where such rule is of course, need not be given. *Anon.* 424

8. A *prochein ami* must be a responsible person. *Dalrymple v. Lamb*, 424

9. A rule merely directing a criminal cause removed into this court by certiorari to be tried in a county other than that in which the offence is alleged to have been committed, will not authorize the trial in such county, without a suggestion on the roll that a fair and impartial trial cannot be had in the county where the indictment was found: and such suggestion cannot be made without special leave obtained from the court. *The people v. Mather*, 431

10. A rule to change the place of trial may be waived by the parties going to trial in the county where the indictment was found. *id*

11. A rule entered in the minutes of the court during one of its terms, without the express direction of the court, and not asked for by either party, will be regarded as a nullity. *id*

12. In partition in a case of default, the proof exhibited must at least be such as would establish a *prima facie* right of recovery in an action of ejectment. The proof must, in the first instance, be submitted to the clerk. *Griggs v. Peckham*, 436

13. Application for security for costs, if made to the court, must be on notice to the plaintiff. *Champlin v. Pierce*, 445

14. If made to a judge at chambers the order will be, that the plaintiff file security in twenty days, or shew cause on the first day of the next term. *id*

See CONSOLIDATION OF ACTIONS, 1, 2. SCIRE FACIAS, 1,

PRESUMPTION OF GRANT AND OF EXTINGUISHMENT OF TITLE.

1. A surrender or re-conveyance to the grantor cannot be presumed, even after a lapse of 55 years, where no foundation for such presumption is laid, by shewing title or claim of right under the grantor, either in the tenant or those from whom he derived his possession. *Doe, ex dem. Marston, v. Butler*, 149

2. A presumption of re-conveyance will be made, where it is necessary to clothe a rightful possession with a legal title; but the court must first see that there is nothing but the form of a conveyance wanting. But this presumption in favour of a grant, against written evidence of title, can never arise from the mere neglect of the owner to assert his right, where there has been no adverse title or enjoyment by those in whose favor the grant is to be presumed. *id*

VOL. III.

PRINCIPAL AND AGENT.

1. Where the course of business between a merchant in the country and a merchant in town is such that the country merchant transmits to his correspondent in town his produce and such other articles as he has to sell, and the merchant in town, in return, supplies him with such articles of merchandise as he deals in, and fills up his orders by procuring from other merchants on credit such articles as he does not deal in, and charges them to the merchant in the country, the latter is not liable to the seller for any articles thus procured, although he directs the purchase of an article which he knows the merchant in town does not deal in, and the seller is informed for whom the purchase is made, if the merchant in the country has funds in the hands of the merchant in the city, and has never authorized him to pledge his credit on the purchase of any articles thus ordered, or recognized such act. *Jaques v. Todd*, 83

2. The agency in such cases is special, without authority to pledge the credit of the principal. *id*

PUIS DARREIN CONTINUANCE.

Matter of defence arising after issue joined, intermediate the term and the circuit, must be plead at the circuit. A plea *puis darrien* under such circumstances, cannot be served in vacation. *Field v. Goodman*, 310

R

REPLEVIN.

1. In an action on a replevin bond it is not necessary to allege the title or estate of the defendant in the action of replevin in and to the premises, for the rent of which the distress was made; nor to avert the making of an affidavit previous to a distress for rent in the city of New-York; nor to state the avowry or cognizance. *Gould and others v. Warner*, 54

2. Although a party takes judgment for a return of the goods, he is entitled to an assignment of the replevin bond. And any defendant in a replevin suit, in case of distress for rent, is entitled to such assignment. *id*

3. The condition of the bond, that the party shall prosecute his suit with effect, is broken when judgment passes against him; and the defendant in the suit, in such case, is entitled to an assignment of the bond. *id*

88

4. A return of the goods to the sheriff is no answer to the action. The return required by the bond is a return to the party from whom they were taken, in pursuance of the judgment of the court, not a mere re-delivery to the sheriff. *id*
5. Replevin bonds are not within the meaning of the act requiring an assignment of breaches and an assessment of damages. The judgment is entered for the penalty. *id*
6. The form of a declaration in an action on a replevin bond approved. *id*
7. On an issue in an action of replevin, in which the plaintiff to an avowry for rent pleads, denying the seisin of the landlord, the demise, the tenancy, and the assignment to the plaintiff, evidence that the defendant in replevin holds by virtue of a deed from the grantor of the plaintiff, executed to him as a security for the payment of money, and that the conveyance to the plaintiff was recorded, and the deed to the defendant not recorded, entitles the plaintiff and not the defendant to a verdict. *Brown v. Dean*, 208
8. A plea to an avowry that the landlord holds under a title which in law amounts to a mortgage, which has not been recorded, and that the plaintiff holds under the same person from whom the landlord derives his title, by a bona fide purchase for valuable consideration, is good, and a complete answer to the avowry. *id*
9. Nor does such plea amount to a disseisin, inasmuch as it shews the relation of landlord and tenant does not exist. *id*
10. The rule, that a tenant shall not plead *nil habuit in tenementis*, applies only where there is a tenancy in fact. *id*
11. An action of replevin will not lie against a receptor of goods taken by virtue of an execution although the action under the circumstances of the case, might be maintained against the sheriff, if the party becomes such receptor at the request or by the consent of the defendant in the execution. *Chapman v. Andrews*, 240
12. A person having the property in goods and chattels, and having the right to reduce them to actual possession, may bring replevin against an officer who takes them by virtue of an execution out of the possession of the defendant in the execution. *Dunham v. Wickoff*, 280
13. The principal that goods taken in execution are in the custody of the law, and cannot be taken out of such custody when the officer has found them in, and taken them out of the possession of the defendant in the execution, applies only as between the defendant and the officer. *id*
14. In replevin, where a plea of property is interposed as well as a plea of non cepit, a verdict for the plaintiff upon the latter plea determines nothing between the parties except the taking, and the plaintiff is not entitled to recover unless the other issue be also found for him. *Bemus v. Beekman*, 667
15. Where the jury found for the plaintiff on the plea of non cepit, but assessed no damages, and on the plea of property, found that it was not in the defendant, but did not find it in the plaintiff, it was held, that the verdict was defective in substance, and that the court was not authorized to amend it by adding nominal damages to the finding of the jury. *id*

S

SALE OF CHATTELS.

1. A contract made in the city of New-York for the sale of 500 bales of cotton, to be delivered on its arrival at New-York from New-Orleans, at any time between the date of the contract, which was the ninth day of February, and the first day of June thereafter, to be paid for in cash on delivery, the cotton to be weighed and two per cent. tare to be allowed is an executory contract, and the title to the cotton does not pass. The vendors are not chargeable for the non-delivery of the cotton until its arrival at New-York; and the specification of the time is only a limitation fixing the period beyond which neither of the parties are bound by the contract, and not an agreement that the cotton shall at all events be delivered by the specified day. *Russell v. Nicoll*, 112
2. A party contracting for the sale and delivery of a large quantity of any particular item of merchandise, (for instance 500 bales of cotton,) on its arrival at a particular port, is not bound to deliver a portion only of the article, the whole not having arrived. The vendee not being bound to receive, the vendor is not obligated to deliver a quantity less than the whole; the obligation being reciprocal. *id*
3. A signing of a note or memorandum of a bargain on the sale of goods, wares and merchandize by the vendors alone, is a sufficient

compliance with the requirements of the statute of frauds. *id*

4. The word sold at the commencement of such a writing means contracted to sell. *id*

5. Fraud in the sale of a chattel cannot be set up in bar of a recovery of a note given on such sale, unless the vendee, on the discovery of the fraud, returns the article purchased to the vendor, or shews it to be entirely destitute of value. *Burton v. Stewart*, 236

6. If the vendee retains the property, he cannot treat the sale as void. *id*

7. Whether the action be brought on the contract or the security, the defendant, on a proper notice, is entitled to give evidence in mitigation of the amount of recovery. *id*

8. A memorandum kept by a clerk of a vendor who sells goods at auction of the articles sold and the prices bid for them, is a sufficient note in writing to bind the vendee. *Frost v. Hill*, 386

9. The assent of the sheriff to the sale by the defendant of goods levied upon by execution, will not divest the title of a purchaser under a previous sale made by the defendant. *id*

10. The naked possession of personal property for a short time, and the exercise of acts of ownership over it, will not authorize a jury to find a transfer of property, where there is no proof of acquiescence or recognition by the former owner of such possession. *Tompkins v. Hale*, 406

11. A warranty of the quality of an article in the sale of chattels when made is an essential part of a bargain, and should be stated in the note or memorandum; the omission of it renders the contract void, and parol evidence is inadmissible to take the case out of the operation of the statute of frauds. *Peltier v. Collins*, 459

12. The object of the note or memorandum is not merely to prove that there was a bargain, but to shew what it was—at least the extent and entirety of the consideration for the promise, for the breach of which the action is brought. *id*

13. There is no contract if there be a material difference between the note of the bargain delivered by a broker to the vendee and that delivered to the vendor. *id*

SCIRE FACIAS.

A *scire facias* against bail removed from the

state, served by leaving a copy at the last usual place of residence of the bail within the state, is a good service. *The People v. Monroe C. P.* 443

SECURITY FOR COSTS.

See PRACTICE, 13, 14.

SET OFF.

1. A set off of money paid on a note will not be allowed in a subsequent action, (on the principle of recovering back money paid by mistake,) where the party paying, being the maker of the note, was ignorant at the time of payment of the fact that the note had not been endorsed by the payee, (against whom he had a defence,) to the holder; it appearing conclusively that although not endorsed, the note was transferred to the holder before maturity for a valuable consideration, and that the omission to endorse happened by inadvertence. *Franklin Bank v. Raymond*, 69

2. A defendant in this court against whom a judgment is rendered will not, on motion, be allowed to set off a justice's judgment holden by him as assignee, where the facts as to the rights of the parties are complicated and intricate. It seems that unless a plain, undisputed, matter of set off is presented by a party thus standing in the character of an assignee of a justice's judgment, the motion will be denied. *Story v. Patten*, 331

See CASE, 7, 8.

SHERIFFS' FEES.

Sheriff's fees on bringing up a prisoner on a *habeas corpus ad testificandum*, are regulated by the fee bill. *Clapp v. Van Epps*, 430

SLANDER.

1. In an action of slander, it is unnecessary to preface each count with all the inducements and allegations contained in the first; a reference in the second count to the allegations in the first is sufficient. *Loomis v. Swick*, 205

2. Where, in the first count of a declaration in slander, it was alleged, in the introductory part of it, that the plaintiff was a merchant, which was omitted in the second and third counts, but the words were alleged to have been spoken in another discourse of and concerning the plaintiff "in his business of a merchant, and of and concerning his said books of account which he kept with his customers and others, as such merchant as aforesaid," it was held, that the reference to the first count was sufficient to cure the defect. *id*

3. A plaintiff is not bound to prove all the words as laid in the declaration; if he proves some which are laid and which are actionable, it is enough. *id*

4. Where, in answer to an inquiry, "Were there any failures yesterday?" it was said, "Not that I know of, but I understand that there is trouble with the Messrs. S.," it was holden that such words being spoken of the plaintiffs as merchants, were actionable in themselves. *Sewall v. Catlin*, 291

5. Any words which in common acceptance imply a want of credit or responsibility, when spoken of a merchant, are actionable. Where such words were spoken by a defendant, evidence that another person heard the report that the plaintiffs had failed, and in consequence withdrew from them business to a large amount, is inadmissible in support of a charge for special damage, unless the report thus acted upon is traced to the defendant. *id*

6. A bank director is not justified in making a communication to a co-director in the public streets, affecting the credit or responsibility of a merchant, where there is no evidence of such communication being confidential. At a meeting of the board of directors, he would be justified in communicating to his associates any report which he might have heard in relation to the solvency or circumstances of the customers of the bank, or probably of any other person. His motive in such case would be presumed to be innocent, which presumption could only be repelled by proof of express malice. *id*

7. In slander, where the words are spoken in a foreign language, the proper mode of declaring is to state the words in the foreign language, and to aver the signification of them in English, and that they were understood by those who heard them. *Wormouth and wife v. Cramer and wife*, 394

8. In an action of slander particular facts which might form links in the chain of circumstantial evidence against the plaintiff cannot be received under the general issue in mitigation of damages; and it was accordingly held, that proof that the plaintiff was in possession of the property alleged to have been stolen, and returned it to the owner about the time of the prosecution of another person for the stealing of another article alleged to have been taken at the same time, was inadmissible under the general issue. *Wormouth and wife v. Cramer*, 395

See Costs, 8.

STREETS.

1. A report of commissioners of estimate and assessment in the city of N. Y. relative to the opening of streets, will not be confirmed, if, in the opinion of this court, the measure is premature, and will cost more than the proprietors of the adjacent land will be benefitted by the operation. *Matter of 4th Avenue, N. Y.* 452

2. Owners of property can be assessed only for the benefit and advantage which they will derive from the improvement, over and above their loss and damage; and such benefit ought not to be speculative and distant, depending upon remote and uncertain contingencies, but should be substantial, certain and capable of being realized within a reasonable and convenient time. *id*

SURETY.

A surety for the payment of rent to a landlord, who engages, in case of a default by the tenant, to make up the deficiency, and fully satisfy the conditions and agreements of the tenant, without requiring notice of non-payment or proof of a demand being made of the tenant, has no right to call upon the landlord to distrain the tenant's goods, and is not exonerated from his covenant, though the landlord, on request, refuses so to do. *Ruggles v. Holden*, 216

See ASSUMPSIT, 6, 7.

T

TOWNS.

Rights of, in respect to commons. *Holladay v. Marsh*, 142

TRESPASS.

1. A plaintiff who is a constable may serve a summons in his own favor, issued by a justice of the peace; and his return cannot be impeached in an action of trespass for an arrest under an execution, issued on a judgment rendered on the return of such summons. *Putnam v. Man*, 202

2. If the return be false, the remedy is by action against the constable for a false return. *id*

TRIAL AND ITS INCIDENTS.

1. It seems, that a party has a right to call and examine witnesses who have arrived

- in court, after the proofs are closed and before the opposite party has summed up the cause to the jury. *Leggett v. Boyd*, 376
2. The granting or refusing the delay of a trial until the party can obtain the attendance of witnesses casually or unexpectedly absent, will be left to the discretion of the circuit judge. *id*
 3. Where the principal and interest due on a bond exceed the penalty, the jury, on the trial of a cause, ought to give the excess in damages. If, however, nominal damages only are assessed by a jury, the excess cannot subsequently be taxed by the taxing officer and included in the costs, as is the practice where the judgment goes by default or confession. *Cook v. Tousey*, 444
 4. Where the nature of the proceedings or the form of action or pleadings gives the opposite party notice to be prepared to produce a writing or instrument, if necessary to falsify his adversary's evidence, no other notice to produce it is requisite. *Story v. Patten*, 486
 5. Accordingly it was held that notice to produce an execution was not necessary in an action against a constable for not returning the process and paying over the money where, in the declaration, the execution and the judgment on which it issued were fully described. *id*
 6. Notice on the trial to a party to produce a written instrument, where there was no evidence that it was in his possession, and where his residence was shewn to be 15 miles from the place of trial, it seems, would have been adjudged insufficient had the notice been necessary. *id*

See PRACTICE, 9, 10, 11.

TROVER.

Where an actual conversion is shewn, a demand and refusal is not necessary in the action of trover. *Tompkins v. Haile*, 406

See LANDLORD AND TENANT, 6, 7. VENDOR AND VENDEE, 1, 2.

TRUSTS.

See CHANCERY, 4, 5.

TURNPIKE COMPANIES.

1. Under the "act relative to turnpike companies," two only of the appraisers appointed to assess the damages of the owners of land over which the road is laid, have power to perform the duties specified by the act; and it is not necessary that all should meet, view the premises, and make inquiry. *Van Steenberg v. Bigelow*, 42
2. An inquisition made by appraisers, under this act, is conclusive as to the facts stated in it relating to their own proceedings; and if enough appears, shewing they had jurisdiction of the subject matter, the court will not collaterally, in an action of trespass wherein it is alleged that the proceedings of the appraisers are irregular, inquire into the regularity of such proceedings; the party must seek his remedy by certiorari. *id*
3. Nor in such action is evidence admissible, that one of the appraisers has not the qualification required by the act, to wit, that he is a freeholder. Such error, if any, must also be corrected by certiorari. *id*

U

USURY.

1. Where A. and B. exchange notes for the purpose of raising money, and A. obtains the note of B. to be discounted at a premium exceeding the lawful rate of interest, such transaction is not usurious, and cannot be set up in bar of a recovery in an action by the purchaser of the note against B. the maker. *Rice v. Mather*, 62
2. Where an insurance company on being applied to for the loan of a sum of money, agree to make the loan on condition that the borrower will effect an insurance with the company, and such insurance is made and a premium paid not exceeding the usual rate of charges in such cases, such facts do not amount to evidence of usury. *Utica Ins. Co. v. Cadwell*, 296
3. Interest taken in advance by a banking institution on discounting a note is not usury. *Bank of Utica v. Phillips*, 408
4. Where usury is pleaded in an answer in chancery, and the facts and circumstances constituting it specially set forth, evidence proving a usurious contract different from that alleged in the answer is inadmissible. *Beach v. Fulton Bank, on appeal*, 573
5. Usury is a good defence in equity as well as at law, whether put forward by way of answer or plea. If the usury be proved, the defendant will succeed; but if he cannot succeed without invoking the exercise of the equitable powers of the court, the aid of the court will not be granted unless he does equity. *id*

6. Where, therefore, an application was made to open the proofs in a cause in chancery for the purpose of re-examining a witness, and to amend an answer so as to embrace an usurious contract to which it was expected the witness would testify on his re-examination, which contract was not set forth in the answer originally put in, it was held that the defendant was not entitled to succeed in his applications, unless he paid or offered to pay the money actually lent, with the legal interest thereof. *id*

7. Trustees, under a deed of assignment for the benefit of creditors, may set up the defence of usury; though, it seems, they are not bound to do so. *id*

V

VARIANCE.

See BILL OF PARTICULARS, 1. DECLARATION, 5, 6.

VENDOR AND VENDEE.

1. A person entering into the possession of wild, uncultivated land, under a contract of sale, giving him a right of entry and occupancy, and reserving to the landlord the land as security until the payment of the consideration money by withholding the deed, has a right to enter and enjoy the land for agricultural purposes. *Moore v. Wait*, 104

2. If such person cuts timber for any purpose other than the cultivation, improvement and enjoyment of the land as a farm, the timber thus separated from the threshold becomes the personal property of the owner of the inheritance, who may maintain an action of trover for it against any one in possession, though a bona fide purchaser under the occupant. *id*

3. Where a vendor of real estate, who was under a contract to execute and deliver a deed by a day certain, executed and tendered a deed which the vendee refused to accept, on the allegation that the true consideration of the conveyance was not expressed in it; and where, from the evidence produced on the trial, the true sum which ought to have been inserted as the consideration did not appear, the court refused to set aside a nonsuit which had been ordered, and intimated their opinion that to put the vendor in default, the vendee should have prepared a deed conformable to the agreement, and presented it to the vendor for execution, who, on refusal, would have been liable to an action. *Hackett v. Huson*, 249

VENIRE.

1. In an action of debt against a sheriff for an escape, in which an issue of fact is joined on a plea in abatement, a *tam quam* clause in a venire is not necessary to authorise the assessment of damages. *Haight v. Holley*, 258
2. Under our present mode of drawing and summoning juries, no defects in the venire, or irregularity in the issuing or return of it, will affect the judgment or the proceedings at the trial. *id*

VENUE.

To entitle a party to remove a cause from the superior court in N. Y. or to change the venue, he must state that the witnesses named by him are each and every of them material to his defence; and that without the testimony of each and every of them he cannot safely proceed to trial; in such case stating as he is advised by counsel and verily believes. *Anon.* 425

VERDICT.

See LIMITATIONS, STATUTE OF, 4, 5.

W

WAGERS.

See ACTIONS, 1.

WASTE.

1. An order to stay waste will be granted after commencement of suit on a proper affidavit. *Bush v. Phillips*, 428
2. Whether notice of the application should be given to the defendant, *quere.* *id*

See EJECTMENT, 6.

WATER PRIVILEGES.

See DEED, 6, 7.

WILL.

1. Where a testator, after devising all his estate, real and personal, to his children, to be taken possession of by them on their severally coming of age, added a clause declaring his will to be, that his wife should hold the whole estate until his children severally came of age; and that they severally, before they took possession of his estate, should give security according to their several proportions of the estate, for and towards a competent maintenance of his wife, during her natural life; it was

held, that the wife of the testator was entitled to retain possession of the estate, until provision was made for her by her children in the manner directed by the will. *Jackson, ex dem. Hotchkiss v. Wight*, 109

2. Where a testator, in disposing of his property by will, gives three portions of his estate to three of his children in fee, and a fourth portion to a fourth child for life with remainder to her issue in fee, and then adds a clause in these words: "Item. I do further will, order and direct, that if any of my children named Jacob, Catharine and Helena, or if the issue of my said daughter Maria should happen to die without lawful issue, that such part of my said estate before devised to such deceased, shall descend to the survivors or survivor of the devisees above named, in equal parts; or in case of the death of any of them leaving lawful issue, to the representative or representatives of such deceased such share as would have descended to such deceased in equal parts;" it was held, that the estates devised to Catharine and Helena, on their decease, went to the issue of Maria, and not to Maria herself, although a specific devise in fee was made to her besides the devise for life. *Jackson ex dem. Burhans v. Elemendorf*, 222
3. A devise to A. B. for and during his natural life, and after his decease to the children of his body lawfully begotten, followed by an *habendum clause* to have and to hold unto the said A. B. for and during his natural life, and after his decease to the heirs of his body lawfully begotten and their heirs and assigns forever, gives a life estate to A. B. and a remainder in fee to his children. *Rogers v. Rogers on appeal*, 503
4. It is not competent to a court of chancery to set aside a will or codicil as to real estate on the ground of fraud or incompetency of the testator; the question should be determined in a court of law on an issue from chancery of *devisavit vel non*. It is otherwise as to a will of personal estate. *id*
5. Personal property specifically bequeathed to the widow of the testator must be applied to the payment of the debts of the estate before land devised by the will can be made chargeable. Nothing but an express declaration or plain manifestation of intention will exonerate the application of the

personal estate, and cast the charge upon the reality. *id*

WITNESS.

1. A grantor, with covenant of warranty, is a competent witness for his grantee in an action of ejectment brought by him for the recovery of the possession of the premises conveyed; although he would not be a competent witness to support the title of his vendee in an action against him for the premises by a third person. *Jackson, ex dem. Montresor, v. Rice*, 180
2. Where two persons were partners as clothiers, and took certain cloths, by the consent of the owner, in payment for their work, and divided them between them, and the share of one of them was subsequently taken under an execution against the original owner, it seems the other is an incompetent witness to prove the title of his partner to the cloths thus taken without a release from such partner. *Chapman v. Andrems*, 240
3. It is no objection to the competency of a witness in an action by a monied institution that a few days before the trial he had sold out his stock, although he stated that he supposed he could purchase it back if he chose; he testifying that the transfer by him was without any agreement, either express or implied, that the stock should be re-conveyed. *Utica Ins. Co. v. Cadwell*, 296
4. The wife of the special bail is an incompetent witness for the defendant. *Leggett v. Boyd*, 376
5. A co-obligor not sued is a competent witness to prove the terms and conditions on which a joint and several bond has been executed, where the suit is commenced against only some of the obligors. *Lovett v. Adams*, 380
6. A vendor of personal property, liable to both parties on his warranty of title, is a competent witness for either, his interest being neutralized. *Frost v. Hill*, 386

See BILLS OF EXCHANGE, 16.

WRIT OF INQUIRY.

See ERROR, 3.

END OF VOLUME THIRD.

Ex. J. M.

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